Court of Appeal
Supreme Court
New South Wales

Summary available

Medium Neutral Citation:	**Jarrett v State of New South Wales [2026] NSWCA 62**
Hearing dates:	26 February 2026
Date of orders:	16 April 2026
Decision date:	16 April 2026
Before:	Bell CJ, Ward P, Free JA
Decision:	(1) The Court declares that Part 2, Division 3A of the *Terrorism (Police Powers) Act 2002* (NSW) impermissibly burdens the implied constitutional freedom of communication on government and political matters and is invalid. (2) The Court declares that section 200(5) of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) impermissibly burdens the implied constitutional freedom of communication on government and political matters and is invalid. (3) The Court declares that sections 27A and 27B *Summary Offences Act 1998* (NSW) impermissibly burden the implied constitutional freedom of communication on government and political matters and are invalid. (4) The defendant is to pay the plaintiffs' costs.
Catchwords:	PUBLIC ASSEMBLY — "public assembly restriction declaration" ("PARD") scheme — *Terrorism and Other Legislation Amendment Act 2025* (NSW) — enacted in the wake of the terrorist attack at Bondi Beach on 14 December 2025 — restriction of the holding of public assemblies within a declared area following a terrorist attack — regime for the authorisation of proposed public assemblies displaced — enhanced police powers when and where a PARD is in force — *Terrorism (Police Powers) Act 2002* (NSW), Pt 2, Div 3A — *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), s 200(5) — *Summary Offences Act 1998* (NSW), ss 27A, 27B CONSTITUTIONAL LAW — Commonwealth Constitution — implied freedom of political communication — importance of peaceful protest — substantial burden on implied freedom — legislature perceived potential of public assemblies to undermine social cohesion and place community at risk — purpose of provisions to address this mischief by restricting and discouraging public assemblies within declared areas — purpose not compatible with maintenance of the constitutionally prescribed system of representative and responsible government — disharmony, incivility and disruption accepted as features of democratic intercourse — scheme not reasonably appropriate and adapted — PARD scheme a blunt tool — inability under scheme to tailor restrictions to characteristics of particular public assemblies — impugned provisions declared invalid CONSTITUTIONAL LAW — "matter" — justiciability — standing — plaintiffs assert special interest as protest organisers affected by PARD initially declared on 24 December 2025 — PARD lapsed before hearing — impugned provision conferring power to make a PARD still in force — non-remote risk that a future PARD may be made impacting the plaintiffs in their protest activities — plaintiffs continue to have standing to maintain the proceedings — matter persists and requires resolution — justiciable controversy apt to be quelled — prudential considerations telling against the exercise of jurisdiction not engaged
Legislation Cited:	*Anti-Discrimination Act 1977* (NSW), s 20C Commonwealth Constitution, ss 7, 24, 51, 64, 128 *Crimes Act 1900* (NSW), ss 93B, 93C, s 93Z, 93ZA, 93ZAA *Crimes Legislation (Police and Public Safety) Act 1998* (NSW), Pt 14 *Criminal Code* (Cth), ss 80.2A, 80.2B, 80.2D, 471.12 *Judiciary Act 1903* (Cth) *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), ss 87MA, 197, 198A, 199, 200, 200(5), 200AA *Major Events Act 2009* (NSW), s 46 *Public Assemblies Act 1979* (NSW) *Prices Regulation Act 1948-1949* (NSW) (repealed) *Summary Offences Act 1970* (NSW) (repealed) *Summary Offences Act 1998* (NSW), ss 3, 4, 4A, 5 (repealed), 11A, 23, 24, 25, 26, 27A, 27B *Terrorism and Other Legislation Amendment Act 2025* (NSW) *Terrorism (Police Powers) Act 2002* (NSW), Pts 2, 2AAA, Div 3A, ss 3, 6, 7, 8, 9, 13, 15, 16, 17, 18, 19, 23A, 23B, 23C, 23D, 23F, 23G, 24, 24A *Vagrants, Gaming and Other Offences Act 1931* (Qld) Road Rules 2014 (NSW), reg 236
Cases Cited:	*Abebe v The Commonwealth* (1990) 197 CLR 510; [1990] HCA 14 *Alexander v Minister for Home Affairs* (2022) 276 CLR 336; [2022] HCA 19 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 332; [2005] HCA 44 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106; [1992] HCA 45 *Brown v State of Tasmania* (2017) 261 CLR 328; [2017] HCA 43 *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross* (2012) 248 CLR 378; [2012] HCA 56 *Clubb v Edwards; Preston v Avery* (2019) 267 CLR 171; [2019] HCA 11 *Coleman v Power* (2004) 220 CLR 1; [2004] HCA 39 *Comcare v Banerji* (2019) 267 CLR 373; [2019] HCA 33 *Commissioner of Police v Allen* (1984) 14 A Crim R 244 *Commissioner of Police v Gray* [2020] NSWSC 867 *Commissioner of Police (NSW) v Naser* [2025] NSWCA 224 *Commissioner of Police v Rintoul* [2003] NSWSC 662 *Croome v The State of Tasmania* (1996) 191 CLR 119; [1997] HCA 5 *Farm Transparency International Ltd v State of New South Wales* (2022) 277 CLR 537; [2022] HCA 23 *Farmer v Minister for Home Affairs* (2025) 99 ALJR 1408; [2025] HCA 38 *Federal Commissioner of Taxation v Consolidated Media Holdings* (2012) 250 CLR 503; [2012] HCA 55 *Fencott v Muller* (1983) 152 CLR 570; [1983] HCA 12 *Harrison v Melhem* (2008) 72 NSWLR 380; [2008] NSWCA 67 *Hobart International Airport Pty Ltd v Clarence City Council* (2022) 276 CLR 519; [2022] HCA 5 *Hogan v Hinch* (2011) 243 CLR 506; [2011] HCA 4 *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 *Kirk v Industrial Relations Commission* (2010) 239 CLR 531; [2010] HCA 1 *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573; [2011] HCA 10 *Lambert v Weichelt* (1954) 28 ALJ 282 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; [1997] HCA 25 *Lees v State of New South Wales* [2025] NSWSC 1209 *Levy v The State of Victoria* (1997) 189 CLR 579; [1997] HCA 31 *McCloy v State of New South Wales* (2015) 257 CLR 178; [2015] HCA 34 *LibertyWorks Inc v The Commonwealth* (2021) 274 CLR 1; [2021] HCA 18 *Mineralogy v State of Western Australia* (2021) 274 CLR 219; [2021] HCA 30 *Monis v The Queen; Droudis v The Queen* (2013) 249 CLR 92; [2013] HCA 4 *Nominal Defendant v GLG Australia Pty Ltd* (2006) 228 CLR 529; [2006] HCA 11 *North Australian Aboriginal Justice Agency v Northern Territory* (2015) 256 CLR 569; [2015] HCA 41 *Padraic Gibson (on behalf of the Dungay family) v Commissioner of Police (NSW Police Force)* (2020) 102 NSWLR 900; [2020] NSWCA 160 *Palmer v State of Western Australia* (2021) 272 CLR 505; [2021] HCA 5 *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1; [2009] HCA 23 *Pidoto v The State of Victoria* (1943) 68 CLR 87; [1944] ALR 1; [1943] HCA 37 *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319; [2010] HCA 41 *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42; [2016] HCA 1 *Raul Bassi v Commissioner of Police (NSW)* [2020] NSWCA 109; (2020) 283 A Crim R 186 *Ravbar v Commonwealth* (2025) 99 ALJR 1000; [2025] HCA 25 *Re Judiciary Act 1903-1920; Re Navigation Act 1912-1920* (1921) 29 CLR 257; [1921] HCA 20 *Ruddick v The Commonwealth* (2022) 275 CLR 333; [2022] HCA 9 *Smith v Blanch* (2025) 118 NSWLR 70; [2025] NSWCA 188 *Stratton v State of New South Wales; Pandolfi v Minister for Health and Medical Research* (2023) 112 NSWLR 1; [2023] NSWSC 396 *Tajjour v State of New South Wales; Hawthorne v State of New South Wales; Forster v State of New South Wales* (2014) 254 CLR 508; [2014] HCA 35 *Terminiello v Chicago* 337 US 1 (1948) *Tey v New South Wales* (2023) 375 FLR 437; [2023] NSWSC 266 *Toowoomba Foundry Pty Ltd v The Commonwealth* (1945) 71 CLR 545; [1945] HCA 15 *Unions NSW v State of New South Wales* (2013) 252 CLR 530; [2013] HCA 58 *Unions NSW v State of New South Wales* (2019) 264 CLR 595; [2019] HCA *Unions NSW v State of New South Wales* (2023) 277 CLR 627; [2023] HCA 4 *Wotton v State of Queensland* (2012) 246 CLR 1; [2012] HCA 2 *Wragg v State of New South Wales* (1953) 88 CLR 353; [1953] HCA 34 *Zhang v Commissioner of Australian Federal Police* (2021) 273 CLR 216; [2021] HCA 16
Texts Cited:	Lord Diplock, "The Courts as Legislators" in Brian W Harvey, *The Lawyer and Justice* (Sweet & Maxwell, 1978)
Category:	Principal judgment
Parties:	Elizabeth Ann Jarrett (First plaintiff) Joshua Lees (Second plaintiff) Paul Silva (Third plaintiff) State of New South Wales (Defendant) Ben Saul (Amicus Curiae)
Representation:	Counsel: D Hume SC / F K Graham / D Farinha / A Bell (Plaintiffs) B Lim SC / H Ryan / A Khadra (Defendant) A Chhabra / D Wilcox (Amicus Curiae) Solicitors: Hanna Legal (Plaintiffs) NSW Crown Solicitor's Office (Defendant) Australian Criminal and Family Lawyers (Amicus Curiae)
File Number(s):	2026/44249
Publication restriction:	Nil

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

HEADNOTE

[This headnote is not to be read as part of the judgment]

In the wake of the terrorist attack at Bondi Beach on 14 December 2025 the State government enacted the *Terrorism and Other Legislation Amendment Act 2025* (NSW) (***Amending Act***). The *Amending Act* introduced a number of amendments to the *Terrorism (Police Powers) Act 2002* (NSW) (***TPP Act***), the *Summary Offences Act 1988* (NSW) (***Summary Offences Act***) and the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) (***LEPRA***) concerning the conduct of public assemblies.

As a result of the Amending Act, the Commissioner of Police was authorised to make a "public assembly restriction declaration" (**PARD**) in certain circumstances. A PARD operates to restrict the holding of public assemblies within the declared area. On 24 December 2025 the Commissioner of Police made such a PARD, declaring that the holding of public assemblies was restricted in a large area comprising central Sydney and areas to the north, south, east and west of Sydney. The PARD was extended, subject to a revision of the area covered by the declaration, on a number of occasions in January and February 2026. It expired on 17 February 2026.

If a PARD is made, one consequence is that authorisation cannot be obtained under Part 4 of the *Summary Offences Act* to hold a public assembly within the declared area. Authorisations of that kind facilitate the lawful conduct of public assemblies by conferring an immunity from certain prohibitions that would otherwise apply to participants in the assembly. For example, provisions concerning the obstruction of other persons and traffic that are apt to be contravened by participants in public assemblies may be disapplied in the case of authorised assemblies. The statutory scheme governing such authorisations allows police (and, where necessary, the Supreme Court) to assess the characteristics of particular proposed assemblies, and to respond accordingly. The authorisation regime is of longstanding and provides a mechanism for balancing freedom of political communication and other important public interest considerations.

The regime for authorisation of proposed assemblies under Part 4 of the *Summary Offences Act* is displaced if a PARD is in force. When and where a PARD applies police officers may also exercise powers under *LEPRA* which are not ordinarily available in relation to public assemblies. This includes the power to issue directions to move on when other people are being obstructed.

Each of the plaintiffs has a history of organising and participating in public assemblies. Each has a special interest in the validity of the PARD scheme because of its potential impact on their ongoing protest activities.

The plaintiffs challenged the validity of the PARD scheme, as created by the *Amending Act,* on the basis that it infringed the freedom of political communication under the Commonwealth Constitution. The challenge encompassed the power to make a PARD under the *TPP Act* (and related provisions in Part 2 Div 3A of the *TPP Act* governing the making, extension and variation of PARDs) and the provisions of the *Summary Offences Act* (ss 27A and 28B) and *LEPRA* (s 200(5)) which attach legal consequences to a PARD once made.

It was common ground that the impugned provisions impose a burden on the freedom of political communication, because their effect is to restrict and discourage public assemblies from occurring within a declared area when the power to make a PARD is exercised. A law which burdens the freedom of political communication in this way is only valid if the burden is imposed to fulfil a constitutionally legitimate purpose, and the means adopted are reasonably appropriate and adapted to achieve that purpose.

The Court held (Bell CJ, Ward P and Free JA), **declaring the impugned provisions invalid:**

As to the implied freedom of political communication

1. The power of the State parliament to pass laws that restrict communication on governmental or political matters is subject to a fundamental limitation, derived from the Commonwealth Constitution. The inquiry for determining whether an impugned law infringes the implied freedom of political communication is orthodox and familiar. The first step is to ascertain if the law imposes a burden on the freedom of political communication. Such a law is only valid if the burden is imposed to fulfil a constitutionally legitimate purpose, and the means adopted are reasonably appropriate and adapted to achieve that purpose: [5], [96]-[100].

Brown v State of Tasmania (2017) 261 CLR 328; [2017] HCA 43, *Farmer v Minister for Home Affairs* (2025) 99 ALJR 1408; [2025] HCA 38, *Farm Transparency International Ltd v State of New South Wales* (2022) 277 CLR 537; [2022] HCA 23, *Unions NSW v State of New South Wales* (2013) 252 CLR 530; [2013] HCA 58, *Comcare v Banerji* (2019) 267 CLR 373; [2019] HCA 33, *Ravbar v Commonwealth* (2025) 99 ALJR 1000; [2025] HCA 25, *McCloy v State of New South Wales* (2015) 257 CLR 178; [2015] HCA 34, *Clubb v Edwards; Preston v Avery* (2019) 267 CLR 171; [2019] HCA 11, *LibertyWorks Inc v The Commonwealth* (2021) 274 CLR 1; [2021] HCA 18, *Smith v Blanch* (2025) 118 NSWLR 70; [2025] NSWCA 188, applied.

2. The State properly conceded that the impugned provisions impose a burden on the freedom of political communication. It is well recognised that public assemblies about government or political matters are a species of communication that engages the implied freedom. Peaceful protest is indispensable to the exercise of political sovereignty by the people of the Commonwealth. The impugned provisions operate by denying the possibility of public assemblies in declared areas being authorised under Pt 4 of the *Summary Offences Act*, and thereby denying the possibility of qualified statutory immunity under s 24 of the *Summary Offences Act*. The result is to make participating in an affected public assembly a more legally precarious activity. Section 200(5) of the *LEPRA* adds to the burden by enhancing police powers to issue directions under s 197 in the context of a public assembly, including where traffic or other persons are being obstructed. Failure to comply with such a direction, without reasonable excuse, is an offence under s 199 of the Act. As many public assemblies will, of their nature, cause obstruction of non-participants in the vicinity, the risk of participants becoming potentially guilty of an offence under s 199 presents a substantial impediment to holding any form of public assembly within a PARD area. The burden is substantial, notwithstanding that a PARD is confined both temporally and geographically: [35]-[42], [101]-[117].

Farm Transparency International Ltd v New South Wales (2022) 277 CLR 537; [2022] HCA 23, *Brown v State of Tasmania* (2017) 261 CLR 328; [2017] HCA 43, *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; [1997] HCA 25, *Tajjour v State of New South Wales; Hawthorne v State of New South Wales; Forster v State of New South Wales* (2014) 254 CLR 508; [2014] HCA 35, *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106; [1992] HCA 45, *Hogan v Hinch* (2011) 243 CLR 506; [2011] HCA 4, *Wotton v State of Queensland* (2012) 246 CLR 1; [2012] HCA 2, applied.

3. The legislature in enacting the *Amending Act* perceived that community tensions were running high after the Bondi Beach attack, as may generally be the case after terrorist incidents. The legislature also perceived that public assemblies in the context of such community tension had the potential to undermine social cohesion and place the community at risk. This was the mischief to which the *Amending Act* is directed. The purpose of the impugned provisions is to address that mischief by restricting and discouraging public assemblies within declared areas, in order to protect social cohesion by avoiding the divisiveness and disharmony that arises from public assemblies being held in the period following a terrorist attack: [6], [118]-[137].

Ravbar v Commonwealth (2025) 99 ALJR 1000; [2025] HCA 25, *Alexander v Minister for Home Affairs* (2022) 276 CLR 336; [2022] HCA 19, *Tajjour v State of New South Wales; Hawthorne v State of New South Wales; Forster v State of New South Wales* (2014) 254 CLR 508; [2014] HCA 35, considered.

Ruddick v The Commonwealth (2022) 275 CLR 333; [2022] HCA 9, *Brown v State of Tasmania* (2017) 261 CLR 328; [2017] HCA 43, *Unions NSW v State of New South Wales* (2019) 264 CLR 595; [2019] HCA 1, *LibertyWorks Inc v The Commonwealth* (2021) 274 CLR 1; [2021] HCA 18, *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573; [2011] HCA 10, *Federal Commissioner of Taxation v Consolidated Media Holdings* (2012) 250 CLR 503; [2012] HCA 55, *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross* (2012) 248 CLR 378; [2012] HCA 56, *Harrison v Melhem* (2008) 72 NSWLR 380; [2008] NSWCA 67, *Nominal Defendant v GLG Australia Pty Ltd* (2006) 228 CLR 529; [2006] HCA 11, *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404, *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 332; [2005] HCA 44, applied.

4. The purpose of the impugned provisions is not compatible with the maintenance of the constitutionally prescribed system of representative and responsible government. It is not a constitutionally legitimate purpose to seek to discourage all forms of public assembly across a nominated geographical area to preserve social cohesion, on the grounds that the very act of holding public assemblies is apt to cause tension and division in the community. The system of representative and responsible government entrenched by the Constitution, involving a free and true choice by the electors, entails acceptance of the potential for disharmony, incivility and disruption that is part and parcel of democratic intercourse. Suppressing public debate of certain kinds may be a means to a legitimate end, but it cannot be a legitimate end in itself. The impugned provisions cannot be read down as the constitutional vice lies in the purpose for which the power has been conferred: [6], [138]-[161].

Unions NSW v State of New South Wales (2019) 264 CLR 595; [2019] HCA 1, *Ravbar v Commonwealth* (2025) 99 ALJR 1000; [2025] HCA 25, *Wotton v State of Queensland* (2012) 246 CLR 1; [2012] HCA 2, *Palmer v State of Western Australia* (2021) 272 CLR 505; [2021] HCA 5, *Farm Transparency International Ltd v State of New South Wales* (2022) 277 CLR 537; [2022] HCA 23, *Monis v The Queen; Droudis v The Queen* (2013) 249 CLR 92; [2013] HCA 4, *Coleman v Power* (2004) 220 CLR 1; [2004] HCA 39, considered.

Farmer v Minister for Home Affairs (2025) 99 ALJR 1408; [2025] HCA 38, *Brown v State of Tasmania* (2017) 261 CLR 328; [2017] HCA 43, *Tajjour v State of New South Wales; Hawthorne v State of New South Wales; Forster v State of New South Wales* (2014) 254 CLR 508; [2014] HCA 35, applied.

5. Even if the *Amending Act* had a legitimate purpose, compatible with the system of representative and responsible government, the means chosen by the legislature are not reasonably appropriate and adapted to achieving that purpose. The PARD scheme is a blunt tool which does not require, or even allow for, consideration of the characteristics or conduct of any particular public assemblies or the nature or severity of any threat to the community that could be said to arise. It is not enough that the legislature perceived the need for strong action to preserve the cohesion and safety of the community in the wake of an exceptionally traumatic public event. The system of government established by the Commonwealth Constitution does not permit the State to pursue such an objective by authorising the executive to impose such a sweeping and indiscriminate restriction on all public assemblies, without any mechanism for tailoring the restriction to assemblies that have the particular consequence of causing another part of the community to feel fearful or threatened: [6], [162]-[170].

Unions NSW v State of New South Wales (2023) 277 CLR 627; [2023] HCA 4, *Tajjour v State of New South Wales; Hawthorne v State of New South Wales; Forster v State of New South Wales* (2014) 254 CLR 508; [2014] HCA 35, *Palmer v State of Western Australia* (2021) 272 CLR 505; [2021] HCA 5, cited.

As to whether the Court has jurisdiction to determine the validity of the impugned provisions and, if so, whether it should be exercised

6. Given the PARD first made on 24 December 2025 is no longer in force and unable to be revived, the impugned provisions are dormant and their validity has no immediate legal significance for the plaintiffs. However, there remains a justiciable controversy, apt to be quelled, about the validity of the provisions that enabled the PARD to be made and that attach legal consequences to such a PARD. The continued existence of the law empowering the Commissioner or a Deputy Commissioner to make a PARD, with all of the consequences then triggered under the impugned provisions, puts the plaintiffs in a position of jeopardy about the operation of the impugned provisions upon them. There is a material risk, which is more than remote, that circumstances will arise in the foreseeable future that will enable the making of a PARD restricting the plaintiffs in their protest activities, particularly given the breadth of the concept of "community safety" relevant to the Commissioner or Deputy Commissioner's state of satisfaction that it is appropriate to make a PARD. The plaintiffs had standing to bring these proceedings when they were commenced and they continue to have standing to maintain the proceedings. Prudential considerations telling against the exercise of the Court's jurisdiction are not engaged. A Chapter III matter persists and requires resolution. The declarations of invalidity sought by the plaintiffs can and should be made: [7], [171]-[222].

Unions NSW v State of New South Wales (2023) 277 CLR 627; [2023] HCA 4, *Zhang v Commissioner of Australian Federal Police* (2021) 273 CLR 216; [2021] HCA 16, *Lambert v Weichelt* (1954) 28 ALJ 282, *Mineralogy v State of Western Australia* (2021) 274 CLR 219; [2021] HCA 30, considered.

Croome v The State of Tasmania (1996) 191 CLR 119; [1997] HCA 5, *Wragg v State of New South Wales* (1953) 88 CLR 353; [1953] HCA 34, *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42; [2016] HCA 1, *Toowoomba Foundry Pty Ltd v The Commonwealth* (1945) 71 CLR 545; [1945] HCA 15, followed.

Pape v Federal Commissioner of Taxation (2009) 238 CLR 1; [2009] HCA 23, *Re Judiciary Act 1903-1920; Re Navigation Act 1912-1920* (1921) 29 CLR 257; [1921] HCA 20, *Hobart International Airport Pty Ltd v Clarence City Council* (2022) 276 CLR 519; [2022] HCA 5, *Fencott v Muller* (1983) 152 CLR 570; [1983] HCA 12, *Abebe v The Commonwealth* (1990) 197 CLR 510; [1990] HCA 14, *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319; [2010] HCA 41, *Clubb v Edwards; Preston v Avery* (2019) 267 CLR 171; [2019] HCA 11, *Tajjour v State of New South Wales; Hawthorne v State of New South Wales; Forster v State of New South Wales* (2014) 254 CLR 508; [2014] HCA 35, cited.

JUDGMENT

1 **THE COURT:** On the evening of 14 December 2025 a shooting attack was carried out on a crowd that had gathered in a park at Bondi Beach to celebrate Chanukah, an important festival in the Jewish community. Fifteen people were killed and 40 others injured. NSW Police promptly characterised the event as a terrorist attack and special powers were engaged under the *Terrorism (Police Powers) Act 2002* (NSW) (***TPP Act***).

2 In the aftermath of the attack the State government perceived that community tensions were running high and that in such conditions public assemblies posed a threat to the cohesion and safety of the community. To address that perception, and related priority issues said to arise from the attack, the legislature passed the *Terrorism and Other Legislation Amendment Act 2025* (NSW) (***Amending Act***). As a result of the *Amending Act*, the Commissioner of Police was authorised to make a declaration that the authorisation of holding of public assemblies within a declared area is restricted ("Public Assembly Restriction Declaration" or "**PARD**").

3 One aspect of the restriction triggered by a PARD is to exclude the option, ordinarily available to an organiser of a public assembly, of obtaining authorisation under Pt 4 of the *Summary Offences Act 1988* (NSW) (***Summary Offences Act***) for an assembly held within the declared area (**the Form 1 system**). The ability to obtain an authorisation of that kind is an arrangement of longstanding in New South Wales: see *Lees v State of New South Wales* [2025] NSWSC 1209 (***Lees***) at [36]. Such an authorisation facilitates the lawful conduct of an assembly by conferring an immunity from certain prohibitions that would otherwise apply to participants in the assembly. Where a PARD is in place police officers may also exercise powers under the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) (***LEPRA***) which are not ordinarily available in relation to public assemblies. This includes the power to issue directions to move on when other people are being obstructed. The practical effect of a PARD is to discourage the holding of any public assembly within the declared area. This is the effect plainly intended by the legislature when it enacted the *Amending Act* and created the PARD scheme. By this device, the freedom to engage in one of the most significant forms of political communication, namely assembling with others in public about a common cause, is impaired.

4 On 24 December 2025 the Commissioner of Police made such a PARD, declaring that the holding of public assemblies was restricted in a large area, comprising central Sydney and areas to the north, south, east and west of Sydney. The PARD was extended, subject to a revision of the area covered by declaration, on a number of occasions in January and February 2026. In broad terms, the effect of the PARD was that for several weeks following Christmas Eve it was not possible to obtain authorisation to hold a public assembly of *any* kind, in relation to *any* topic, subject matter or cause in large areas of Sydney and its surrounding suburbs. To the extent that such an assembly proceeded without authorisation, any participant was at risk of infringing various legal restrictions which are apt to be triggered when public assemblies occur. This included the risk of being subjected to move on directions if any other person was obstructed.

5 When it comes to laws of this kind that restrict communication on governmental or political matters, the legislative power of the State is subject to a fundamental limitation, derived from the Commonwealth Constitution. Such a law is only valid if the burden on freedom of communication is imposed to fulfil a constitutionally legitimate purpose, and the means adopted are reasonably appropriate and adapted to achieve that purpose. The implied freedom reflected in this limitation is essential to the maintenance of the system of representative and responsible government for which the Constitution provides: *Brown v State of Tasmania* (2017) 261 CLR 328; [2017] HCA 43 (***Brown***) at [88]. Constitutional validity depends upon both the purpose of the law and the means of achieving that purpose being compatible with that system: see, for a recent summary of the guiding principles, *Farmer v Minister for Home Affairs* (2025) 99 ALJR 1408; [2025] HCA 38 (***Farmer***) at [1]. It is therefore not enough that the legislature perceives a pressing need to take strong legislative action in the public interest. The State operates within a constitutional system that gives priority to the freedom of political communication and restricts the power of the State to burden that freedom. That restriction is not, however, absolute. The Constitution compels close scrutiny by the courts to enforce that constitutional limitation: *Farm Transparency International Ltd v State of New South Wales* (2022) 277 CLR 537; [2022] HCA 23 (***Farm Transparency***) at [77].

6 The impugned provisions of the *Amending Act* restrict the freedom of political communication in a constitutionally impermissible way. It is not a legitimate purpose, in the constitutional sense, to seek to preserve social cohesion by discouraging *all forms* of public assembly across a nominated geographical area and irrespective of the purpose of the public assembly and the actual impact (if any) such an assembly may have on social cohesion. Even if that were a legitimate purpose, compatible with the system of representative and responsible government, the means chosen by the legislature are not reasonably appropriate and adapted to achieving that purpose. The PARD scheme is a blunt tool. It does not require, or even allow for, consideration of the purpose, characteristics or conduct of any particular public assembly caught by a PARD or the nature or severity of any threat to the community that could be said to arise from any particular assembly. It is not enough that the legislature perceived the need for strong action to preserve the cohesion and safety of the community in the wake of an exceptionally traumatic public event. The system of government established by the Commonwealth Constitution does not permit the State to pursue such an objective by authorising the executive to impose such a sweeping and indiscriminate restriction on all public assemblies.

7 Although the PARD first made on 24 December 2025 has now ceased to apply, there remains a justiciable controversy, apt to be quelled, about the validity of the provisions that enabled the PARD to be made and that attach legal consequences to such a PARD. The plaintiffs had standing to bring these proceedings when they were commenced and they continue to have standing to maintain the proceedings. A Chapter III matter persists and requires resolution. The declarations of invalidity sought by the plaintiffs can and should be made.

Procedural history and parties

8 The proceedings were commenced by summons filed on 7 January 2026. On 29 January 2026, Bell CJ made orders removing the proceedings from the Common Law Division to the Court of Appeal. The hearing of the matter on 26 February 2026 proceeded by reference to an amended summons filed, pursuant to the Court's leave, the following day. By the amended summons Elizabeth Ann Jarrett, Joshua Lees and Paul Silva (together, **the plaintiffs**) seek declarations that the following provisions (**impugned provisions**) impermissibly burden the implied freedom of communication on government and political matters and are invalid:

(1) Pt 2, Div 3A of the *Terrorism (Police Powers) Act 2002* (NSW) (***TPP Act***) or, in the alternative ss 23B(2), 23C and 23D of the *TPP Act*;

(2) section 200(5) of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) (***LEPRA***); and

(3) sections 27A and 27B *Summary Offences Act*.

Submissions of *amicus curiae*

9 At the hearing on 26 February 2026 the Court granted leave for Professor Ben Saul (the United Nations Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism) to participate in the proceedings as amicus curiae, with such participation confined to the provision of written submissions. Those written submissions were primarily directed to the recognition of the right to peaceful assembly in international law. As argument transpired between the parties, that was not a perspective that was shown to be significant to resolving the issues of Australian constitutional law that require determination in this matter. Nor do we consider it necessary to address in any detail the recognition of the right to peaceful assembly in international law. We do however acknowledge the contribution which Professor Saul sought to make as amicus curiae.

The plaintiffs and their protest activities

10 The relevant facts about the backgrounds and activities of each of the plaintiffs were largely agreed by the parties.

11 Ms Jarrett was born in Grafton on Bundjalung Country. Bowraville on Gumbaynggir Country is her home community. Ms Jarrett is a member of a group known as "Blak Caucus" and purports to bring the present proceedings on behalf of that group. Blak Caucus is a group made up of First Nations activists who organise protest rallies, cultural events and other campaigning events in Sydney. Ms Jarrett has been involved in various protests in the past. She regards protest as a critical tool to challenge the ongoing injustices faced by First Nations people, and she is concerned that the impugned provisions (in particular the increased police powers to give directions) will disproportionality affect First Nations people.

12 Mr Lees is also an experienced political activist. For a number of decades he has participated in and organised public assemblies, protests and marches. He is an organiser with the Palestinian Action Group (**PAG**), a coalition of individuals and organisations from different political backgrounds dedicated to the cause of a "Free Palestine". One of the guiding principles of PAG is opposition to all forms of racism including Islamophobia and antisemitism.

13 Mr Lees is familiar with the system of obtaining authorisation for public assemblies that he has organised. This involves submitting a "Form 1" document under Pt 4 of the *Summary Offences Act* to obtain authorisation for a public assembly. Mr Lees has been involved in, and helped to organise, many protests for causes including refugee rights, climate action and LGBT rights. His decades of experience as an activist includes participating in and organising marches on roads for the purpose of political protest.

14 The third plaintiff, Mr Silva, is a Dunghutti man from Kempsey. Like the first plaintiff, Mr Silva is a member of Blak Caucus and purports to bring the proceedings on behalf of that group. Mr Silva is an activist and a "prominent voice in the fight against systemic injuries faced by First Nations people in Australia", with a focus on Aboriginal deaths in custody, systemic racism and high incarceration rate. According to the agreed facts, Mr Silva believes that the act of "walking together, with Aboriginal people and non-Aboriginal people, is a critical and symbolic demonstration of a commitment to a shared future".

15 The following was agreed in relation to the plaintiffs:

> 9 The plaintiffs … :
>
> (a) intend to continue to protest even if the area of the protest becomes subject to a public assembly restriction declaration;
>
> (b) are exposed to a greater risk (compared to ordinary citizens) of being subject to a move on direction or arrest by reason of regularly participating in genuine protests that may obstruct a walkway or traffic or be believed (whether correctly or not) by police to involve harassment, intimidation or causing fear to another person;
>
> (c) wish to protest without being the subject of a move-on direction and avoid the risk of arrest for failing to move or for breaching offences in relation to obstruction and in relation to which they might otherwise enjoy immunity from criminal liability under the Form 1 system; and
>
> (d) are affected by the laws in a different and additional way than citizens who do not regularly engage in protests that may obstruct a walkway or traffic or be believed by police (whether correct or not) to involve harassment, intimidation or causing fear to another person.

16 The history of protest activities by the plaintiffs and their present intention to protest in the future assume significance on the question of standing and for the resolution of the debate about the existence of a constitutional matter. We address those matters at the conclusion of our judgment.

Events before and after the PARD

17 As described in the agreed facts, the attack at Bondi Beach on 14 December 2025 was "a heinous antisemitic terrorist attack against a public Chanukah celebration". The attack had a "profound effect on the Jewish community". It caused "deep emotional harm to the families of those killed (most of whom were Jewish)" and "nationwide horror". No doubt deep emotional harm extended well beyond the families of those killed.

18 The exceptional nature of the event is reflected in the governmental response. At 9.36pm on the night of the attack, the Commissioner of the NSW Police Force (**Commissioner**) gave authorisation of special powers under s 6 of the *TPP Act*. An authorisation of that kind authorises the exercise by police officers of special powers conferred by Pt 2 of the *TPP Act* to deal with terrorist acts. As required by s 6 of the *TPP Act*, the authorisation was given by the Commissioner on the basis that he was satisfied that there were reasonable grounds for believing that a terrorist act had been committed and was satisfied that the exercise of the special powers in Pt 2 of the *TPP Act* would substantially assist in apprehending the persons responsible for committing the terrorist act. The Commissioner gave a further authorisation on 15 December 2025. The exercise of those powers was not challenged in these proceedings.

19 The Bondi Beach attack also prompted a swift and significant legislative response by the State. The Terrorism and Other Legislation Amendment Bill 2025 (NSW) (**the Bill**) was introduced to the Legislative Assembly on 22 December 2025. It was passed by the Assembly with amendments on the same day. The Bill was introduced to the Legislative Council on 23 December 2025 and passed on 24 December 2025. The Governor also gave assent on 24 December 2025, and on that day each of the impugned provisions came into effect. A detailed discussion of the impugned provisions, and the broader statutory context, is contained below at [43]-[82].

20 The *Amending Act* introduced a new Div 3A into Pt 2 of the *TPP Act.* One of the provisions in the new Div 3A is s 23B of the *TPP Act.* Subsection (2) of s 23B provides that the Commissioner (or a Deputy Commissioner of Police) may, by written instrument, make a public assembly restriction declaration, being a declaration that an area described in the declaration is an area in which the authorisation of the holding of public assemblies is restricted.

21 On 24 December 2025 at 5:23pm, the Commissioner of the NSW Police Force (**the Commissioner**) made such a declaration (**the PARD**). The PARD included the following declarations by the Commissioner:

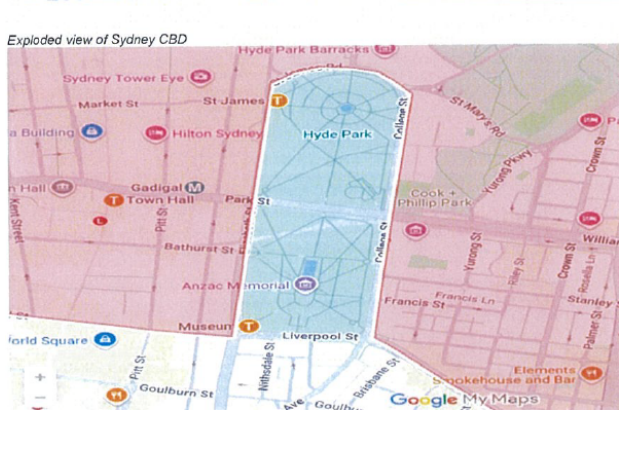
> I, Mal Lanyon, Commissioner of Police of the New South Wales Police Force, declare that the following areas are areas in which the authorisation of holding of public assemblies is restricted:
>
> 1. The Central Metropolitan Police Region, The Northwest Metropolitan Police Region, The Southwest Metropolitan Police Region.
>
> In making this declaration, I am satisfied that the holding of public assemblies in the area to which this authorisation applies would be likely to cause:
>
> 1. A risk to community safety, including the safety of participants in public assemblies in the areas.

Section 24(2) of the *TPP Act* provides that, except where the Police Minister is not able to be contacted, a PARD may be made only with the concurrence of the Police Minister. The Police Minister concurred with the making of the PARD at 6:08pm on 24 December 2025. The Police Minister provided further concurrence as required for the extensions described below.

22 The NSW Police did not publish a map of the area to which the PARD applied in the period. The agreed facts and other evidence before the Court did not establish the precise scope of the area described in the PARD as made on Christmas Eve. It was common ground that the area encompassed all of the Sydney CBD and extended to substantial areas beyond Sydney, including apparently the entirety of the eastern suburbs, the north shore, northern beaches, the western and south-western suburbs and the Blue Mountains.

23 Pursuant to s 23B(4) of the *TPP Act*, a PARD commences when the declaration is made and ends 14 days thereafter unless it is extended under s 23C (or is otherwise revoked or ceases to have effect under s 23F(3)(b)). On 6 January 2026 at 3:18pm, the Commissioner extended the Declaration for a further 14 days applying to the same geographical area.

24 On 20 January 2026, the Commissioner extended and varied the PARD. The variation reduced the area to which the PARD applied, as shown in the shaded area of a map attached to the declaration. That shaded area covered the areas of the Eastern Suburbs Police Area Command and most of the CBD, excluding Hyde Park, but including Town Hall Square, Parliament House, Queen's Square at the Supreme Court, and their respective surrounding streets. The shaded area attached to the PARD as extended and varied on 20 January 2026 is extracted below:



25 On 29 January 2026, the Commissioner extended the PARD (in respect of that more confined area) until 3 February 2026. The Commissioner made a fourth extension of the PARD on 3 February 2026, which lasted until 17 February 2026. The PARD expired on that day.

26 It was common ground at the hearing on 26 February 2026 that, given the expiry of the PARD, there was no capacity for the Commissioner to further extend that same PARD. It follows that, to the extent that the impugned provisions are triggered by the making of a PARD, that will only occur if and when a fresh PARD is made at some unknown point in the future. The impugned provisions are in this sense now dormant. The parties made competing submissions about the likelihood of a PARD being made again in the future. That is an issue that has at least potential bearing on the question of whether there is a Chapter III matter that the Court can and should resolve. The State submits that there is no more than a remote possibility that they may be enlivened again in the future. The plaintiffs say that this understates the likelihood that circumstances will arise again which are apt to prompt the making of a new PARD. We return to that topic below.

Forms of public assembly and particular examples

27 Reference was made in the evidence and in the submissions of the parties and amicus curiae to various public assemblies and types of assemblies, both actual and hypothetical, for the purpose of illustrating the practical effect of the impugned provisions and assessing the true extent of the burden that they impose on the freedom of political communication. The plaintiffs also relied on evidence of particular public assemblies in which they have been involved as both illustrative of the impact of the impugned provisions and as bearing on questions of standing, jurisdiction and justiciability. However, putting those questions to one side, the plaintiffs' challenge to the impugned provisions depends upon the application and potential application of those provisions to public assemblies generally, rather than to particular assemblies or types of assemblies. Given the nature of that challenge, it is sufficient to refer to only a small number of examples, and to make some general observations about the nature of public assemblies as a form of political communication.

28 Time and place are critical considerations for those seeking to organise and participate in public assemblies to express a political position. This is in part a matter of logistical convenience. Holding a public assembly in a place that is convenient to access, congregate within and potentially march from is apt to maximise attendance and therefore public attention and political impact. Thus, for example, Hyde Park in central Sydney has become a popular point for the holding of public assemblies and the commencement of marches.

29 The location of a public assembly may also have symbolic significance. Examples include gatherings outside Parliament House, Town Hall, the Harbour Bridge, the Opera House and the Law Courts Building. Assemblies at major public landmarks may carry additional impact because of the inherent status of those landmarks or because of their institutional significance. The subject matter of the protest may involve a particular connection with the chosen location, for example protests held outside Parliament against a law of the Parliament. There may also be a link between location and timing, for example assemblies held to coincide with particular meetings, court hearings or votes in Parliament. Timing may be important because the assembly is responsive to an event, such as a gathering to protest about the outbreak of a particular war. Timing may be significant for symbolic reasons, such as assemblies to mark a particular anniversary. For example, Australia Day has been marked in recent years by "Invasion Day" protests against the historical injustices suffered by First Nations people since 26 January 1788.

30 Another example is provided by the experience of the third plaintiff, Mr Silva. Mr Silva's uncle, David Dungay Jr, died in police custody. Mr Silva is regularly involved in rallies to express his views about Aboriginal deaths in custody, systemic racism and high incarceration rates of First Nations people. Mr Silva was involved in organising a rally on 18 January 2026 in Hyde Park to mark the tenth anniversary of Mr Dungay's death, with the intention of marching on nearby roads. In advance of that rally a Form 1 was submitted seeking authorisation for the assembly under Pt 4 of the *Summary Offences Act.* As the PARD remained in place, and applied at the time to the roads around Hyde Park, authorisation for the proposed assembly could not be given. The assembly proceeded in the absence of authorisation. A gathering of people heard speeches in Hyde Park, after which Mr Silva invited the crowd to join him in marching to the Domain. Before such a procession could occur, a police officer at the scene directed Mr Silva and those with him to turn, and ten police on horseback blocked the path crowd's path out of Hyde Park towards the Domain. Mr Silva then instructed the crowd not to march and instead to disperse. The crowd stopped marching and peacefully dispersed.

31 On 31 January 2026, the PAG and Jews Against the Occupation '48 submitted a Form 1 to the NSW Police in respect of a planned public assembly at Town Hall along with a planned procession to Parliament House. The planned protest, on 9 February 2026, was timed to coincide with the visit to Sydney of the Israeli President Isaac Herzog. As the area in question was covered by the PARD, authorisation could not be given under Pt 4 of the *Summary Offences Act*.

32 On 6 February 2026, the visit of President Herzog was declared to be a major event under the *Major Events Act 2009* (NSW) (***Major Events Act***). That enlivened certain powers under the *Major Events Act,* including under s 46:

> **46 Directions to leave**
>
> …
>
> (4) An authorised officer may direct a person to leave a major event area or any part of a major event area if the officer believes on reasonable grounds that—
>
> (d) the person is causing a significant disruption or inconvenience or behaving in an offensive manner or in a manner likely to endanger the person or another person...

33 On 9 February 2026, a large group of protestors, including each of the plaintiffs, assembled at Town Hall. Following various speeches and chants, parts of the group attempted to march to NSW Parliament House. Various participants in the assembly were pepper sprayed by police, twenty-seven people (including the first and third plaintiffs) were arrested and nine people were charged with offences.

34 There is some ambiguity about the powers that were exercised by NSW Police in dispersing the crowd on that occasion. The relevant entry in the NSW Police computer system, "COPS", suggests that the officers involved relied on public order powers to disperse people under s 87MA of *LEPRA* (see **"LEPRA – PUBLIC ORDER – DISPERSE GROUP (S 87MA)"**. However, evidence about how that entry came to be recorded suggests that the responsible officer, SC Walpole, chose from the pre-populated options based on her understanding of which description was likely to be the most appropriate. Other evidence about what occurred between police and attendees of the Herzog Protest suggests that the relevant officer, Inspector Coffey, issued what he considered to be a direction to attendees to leave under s 46 of the *Major Events Act,* not s 87MA of *LEPRA*. Although nothing decisive turns on the matter (for the reasons developed at the conclusion of our reasons), we prefer the evidence indicating that the relevant officer considered himself to be issuing a direction under s 46 of the *Major Events Act.* That evidence is sourced to the officer directly involved at the time and is more reliable than the inferences that can be drawn from the COPS entry.

Public assemblies as a form of communication protected by the implied freedom

35 It is well recognised that public assemblies constitute a form of communication, and that public assemblies about government or political matters are a species of communication that engages the implied freedom in the Commonwealth Constitution. Participating in a public assembly has as an "inherently political content": *Lees* at [126]. Actions as well as words can communicate ideas: *Levy v The State of Victoria* (1997) 189 CLR 579 at 594 per Brennan J, see also 613; [1997] HCA 31 (***Levy***). As McHugh J held in *Levy* at 622-623, "[s]igns, symbols, gestures and images are perceived by all and used by many to communicate information, ideas and opinions". By the time *Levy* was decided, televised protests by non-verbal conduct had become a commonplace of political expression: at 595 per Brennan J. The ensuing decades have seen an increase in both the prevalence and variety of non-verbal forms of political communication.

36 In *Brown* at [88], Kiefel CJ, Bell and Keane JJ described peaceful protest, along with other forms of free expression of political opinion, as being "indispensable to the exercise of political sovereignty by the people of the Commonwealth". In *Commissioner of Police v Gray* [2020] NSWSC 867 at [59], Adamson J addressed the significance of public assemblies as a distinctive form of political activity, in rejecting a submission that it was sufficient for people interested in a particular cause, during a period of public health restrictions, to communicate via social media. Her Honour said:

> The importance of free speech as exemplified by public political gatherings does not need to be established. It is regarded as a hallmark of a democratic society. … Demonstrations in public spaces remain a powerful method of advancing particular causes to governments and the general community, as well as engendering a feeling of solidarity among participants and those associated with them who may be unable to be present.

37 There is a great variety of forms of public assembly, even when confining consideration to assemblies which concern governmental and political matters. Static, peaceful vigils may serve political ends, often in a powerful way, without necessarily involving any element of distress or even inconvenience to others. Other public assemblies, particularly those that are styled as protests and those involving mobile crowds, may have a greater potential to cause disruption as well as adverse personal and political reactions in others in the community. They may provoke strong emotional responses, both positive and negative. That is often a key aspect of protest activity, and of political discourse more broadly. (To the extent that public assemblies may cause disruption and inconvenience to other members of the community, the Form 1 system operates as a means of planning for and managing such consequences.)

38 Political expression may be erudite, respectful and sophisticated, but it may also be confronting, upsetting and provocative. Protests can involve appeals to emotion rather than reason. In *Levy* at 613 Toohey and Gummow JJ held that "[t]he appeal to reason cannot be said to be, or ever to have been, an essential ingredient of political communication or discussion". The freedom of communication safeguarded by the Constitution encompasses the full spectrum of such communications. In *Levy* at 623 McHugh J held:

> [T]he constitutional implication does more than protect rational argument and peaceful conduct that conveys political or government messages. It also protects false, unreasoned and emotional communications as well as true, reasoned and detached communications. To many people, appeals to emotions in political and government matters are deplorable or worse. That people should take this view is understandable, for history, ancient and modern, is full of examples of the use of appeals to the emotions to achieve evil ends. However, the use of such appeals to achieve political and government goals has been so widespread for so long in Western history that such appeals cannot be outside the protection of the constitutional implication. In *Cohen v California* [(1971) 403 US 15 at 26], Harlan J, delivering the opinion of the United States Supreme Court, said that the notion of freedom of expression "conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well".

39 In *Clubb v Edwards; Preston v Avery* (2019) 267 CLR 171; [2019] HCA 11 at [164] (***Clubb***), Gageler J (as the Chief Justice then was) described a protest, or public demonstration, as "the oldest and most orthodox form of public expression of political dissent in a representative democracy". His Honour's use of the word "dissent" in this context is noteworthy. Political communication, especially public protest, routinely involves the expression of displeasure with, and resistance to, the actions and views of political actors and other people in the community. One of the reasons the implied freedom of political communication is necessary is because without it people of different backgrounds or with different perspectives or information could be legally prevented from exchanging views on matters bearing on, among other things, electoral choices: see *Levy* at 622 per McHugh J. Such inhibition is at odds with the system of representative and responsible government established by the Constitution. The implied freedom of political communication thereby serves to safeguard against the systemic risk, in a majoritarian system, that political communications unhelpful or inconvenient or uninteresting to a current majority might be unduly impeded: *Brown* at [202]; *Farm Transparency* at [76]-[77].

40 The expression of dissent about policies and attitudes associated with the majority or the prevailing orthodoxy is an archetypal form of protest. Such activity is often capable of causing in others (including potentially large parts of the community) a degree of annoyance, unease and even hostility, whether or not they are in the vicinity of the public assembly. Representative democracy, of its very nature, involves a contest of viewpoints and ideas. That can include the propagation of viewpoints and ideas considered by others to be unwelcome. In preserving the capacity for electors to gain an appreciation of the available alternatives, the implied freedom serves to secure the "true choice" that electors are intended to have pursuant to ss 7 and 24 of the Constitution: *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 560; [1997] HCA 25 (***Lange***).

41 Such qualities of dissent have been well recognised in other constitutional settings. In *Terminiello v Chicago* 337 US 1 (1948) at 4 Justice Douglas, in giving the opinion of the United States Supreme Court, observed that free speech, as protected by the First Amendment:

> may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to angle. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.

42 We make these observations because we regard it as important to explain the principles underpinning the constitutional protection of public assemblies when assessing the burden on freedom of political communication imposed by the impugned laws and when testing the constitutional permissibility of the legislative purpose and the chosen legislative means.

The Statutory Framework

43 The construction and operation of the impugned provisions must be understood before considering their constitutional validity: *North Australian Aboriginal Justice Agency v Northern Territory* (2015) 256 CLR 569; [2015] HCA 41 at [11]. Relatedly, a critical step in understanding the burden imposed by an impugned law on the freedom of political communication is to identify the relevant "baseline" for assessing the incremental burden imposed by that law. That baseline is the existing capacity to engage in communication of the relevant kind, having regard to laws that applied prior to the impugned law. It is therefore necessary to explain how the impugned provisions operate by reference to, and as a variation of, the pre-existing legal arrangements affecting the conduct of public assemblies. We begin by considering the relevant Acts as they existed before the relevant amendments introduced by the *Amending Act*.

Terrorism (Police Powers) Act 2002 (NSW) – Prior to the Amending Act

44 The object of the *TPP Act*, as reflected in its long title, is to confer special powers on police officers to deal with terrorist acts. A "terrorist act" for the purposes of the *TPP Act* is defined in s 3 as follows:

> **3 Definition of "terrorist act"**
>
> (1) General In this Act, terrorist act means an action where—
>
> (a) the action falls within subsection (2) and does not fall within subsection (3), and
>
> (b) the action is done with the intention of advancing a political, religious or ideological cause, and
>
> (c) the action is done with the intention of—
>
> (i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country, or
>
> (ii) intimidating the public or a section of the public.
>
> (2) Action included Action falls within this subsection if it—
>
> (a) causes serious harm that is physical harm to a person, or
>
> (b) causes serious damage to property, or
>
> (c) causes a person's death, or
>
> (d) endangers a person's life, other than the life of the person taking the action, or
>
> (e) creates a serious risk to the health or safety of the public or a section of the public, or
>
> (f) seriously interferes with, seriously disrupts, or destroys, an electronic system including, but not limited to—
>
> (i) an information system, or
>
> (ii) a telecommunications system, or

> (iii) a financial system, or
>
> (iv) a system used for the delivery of essential government services, or
>
> (v) a system used for, or by, an essential public utility, or
>
> (vi) a system used for, or by, a transport system.
>
> (3) Action excluded Action falls within this subsection if it—
>
> (a) is advocacy, protest, dissent or industrial action, and
>
> (b) is not intended—
>
> (i) to cause serious harm that is physical harm to a person, or
>
> (ii) to cause a person's death, or
>
> (iii) to endanger the life of a person, other than the person taking the action, or
>
> (iv) to create a serious risk to the health or safety of the public or a section of the public.

45 This definition is intended to apply to terrorist acts occurring outside the State. The functions conferred by the *TPP Act* may therefore "be exercised whether or not the terrorist act has been, is being, or is likely to be committed in New South Wales": s 4A.

46 Section 6 of the *TPP Act* provides for the giving of authorisation, either orally or in writing, for the use of special powers. As explained further below, this provides one of the potential triggers for the marking of a PARD. Section 6 of the *TPP Act* provides:

> **6 Authorisation of special powers to investigate terrorist act in the immediate period after its occurrence**
>
> An authorisation for the exercise of the special powers conferred by this Part may also be given in accordance with this Division if the police officer giving the authorisation—
>
> (a) is satisfied that there are reasonable grounds for believing that a terrorist act has been committed, and
>
> (b) is satisfied that the exercise of those powers will substantially assist in apprehending the persons responsible for committing the terrorist act.

47 Prior to 14 December 2025, the power to make an authorisation under s 6 had only been exercised once. On the afternoon of the Lindt Café siege on 15 December 2014 an authorisation under s 6 was given.

48 An authorisation may be given by the Commissioner of Police or by a Deputy Commissioner of Police: s 8(1). If an authorisation is sought urgently and it is not possible to contact the Commissioner or a Deputy Commissioner an authorisation may be given by a police officer above the rank of superintendent: s 8(2). The officer giving an authorisation under s 6 must also be satisfied "that the nature and extent of the powers to be conferred by the authorisation are appropriate to the threatened or suspected terrorist act": s 8(3). An authorisation may only be given with the concurrence of the Police Minister, unless the Minister is not contactable at the time it is given: s 9.

49 An authorisation under s 6 of the *TPP Act* unlocks the powers in Pt 2, Div 3. Those powers relate to such matters as requiring the disclosure by a person of their identity (s 16), powers to search persons, vehicles and premises without a warrant (ss 17, 18, 19) and powers to seize and detain things in connection with a search under Div 3 (s 20). Such powers may be exercised for the purposes for which an authorisation is given: s 15. Having regard to ss 6 and 7, the overarching purpose of an authorisation given under s 6 is to assist in apprehending the persons responsible for committing the relevant terrorist act. More specific aspects of that purpose may include to find a particular person named or described in the authorisation or to find a particular vehicle or kind of vehicle.

50 Section 13 is a privative clause providing that an authorisation under s 6 "may not be challenged, reviewed, quashed or called into question on any grounds whatsoever". A section of this kind would not be effective to preclude review for jurisdictional error, in light of *Kirk v Industrial Relations Commission* (2010) 239 CLR 531; [2010] HCA 1.

51 Part 2AAA of the *TPP Act* is entitled "Police use of force—ongoing terrorist acts". Section 24A provides as follows:

> **24A Police Commissioner may declare this Part applies to terrorist act to which police are responding**
>
> (1) If the Commissioner of Police is satisfied that—
>
> (a) an incident to which police officers are responding is or is likely to be a terrorist act, and
>
> (b) planned and coordinated police action is required to defend any persons threatened by the terrorist act or to prevent or terminate their unlawful deprivation of liberty,
>
> the Commissioner may declare that it is a terrorist act to which this Part applies.
>
> (2) A declaration made under this Part applies to each location at which police officers are responding to the incident.

52 A declaration under 24A has never been made.

Summary Offences Act 1988 (NSW) – Prior to the Amending Act

53 *The Summary Offences Act* regulates the conduct of persons in, or in the vicinity of, a "public place". Public place is defined in s 3(1):

> ***public place*** means—
>
> (a) a place (whether or not covered by water), or
>
> (b) a part of premises,
>
> that is open to the public, or is used by the public whether or not on payment of money or other consideration, whether or not the place or part is ordinarily so open or used and whether or not the public to whom it is open consists only of a limited class of persons, but does not include a school.

54 Part 4 of the *Summary Offences Act* establishes a regime for the regulation of public assemblies through a process of notification, consultation, and negotiation with the executive government.

55 The regime currently in force under the *Summary Offences Act* substantially replicates the regime which existed under the *Public Assemblies Act 1979* (NSW): *Lees* at [36]. Before the introduction of the *Public Assemblies Act* there was a somewhat different regime under the now repealed *Summary Offences Act 1970* (NSW). Under that Act a permit could be sought from the executive government which, broadly speaking, had the effect of depriving police of powers to disperse people taking part in a protest.

56 The present regime in Pt 4 of the *Summary Offences Act* encourages the early notification of proposed assemblies to the Commissioner by prescribed notice, which is known as a "Form 1 Notice". Subsections 23(1)(a)-(e) set out the requirements of a Form 1 Notice, including the need for advanced notice in writing and compliance with the prescribed form. The notice must describe the date, time and place of the proposed assembly, the proposed route of any procession, as well as the number of persons expected to be participants in the proposed public assembly. A notice must be signed by a person who "indicates in the notice that he or she takes responsibility for organising and conducting the proposed public assembly": s 23(1)(e). An important purpose of a Form 1 notice is to give early and reasonably precise notification to the police of what is planned so that the police can make their assessment of safety or other risks in the proposal, and commence a dialogue in relation to risk mitigation.

57 If the requirements in s 23(1)(a)-(e) have been complied with, there are three scenarios in which a proposed public assembly may become an "authorised public assembly" for the purposes of Pt 4. The first is where the Commissioner notifies the organiser that the Commissioner does not oppose the holding of the assembly: s 23(1)(f).

58 The second is where notice has been served on the Commissioner at least seven days before the proposed assembly and there is no order by the Court under s 25(1) prohibiting the holding of the assembly: s 23(f)(i).

59 Where an application is made by the Commissioner under s 25(1), the onus lies upon the Commissioner to convince the Court that the proposed assembly should be prohibited: *Raul Bassi v Commissioner of Police (NSW)* [2020] NSWCA 109; (2020) 283 A Crim R 186 at [17(vi)]. This Court made such a prohibition order last year in respect of a proposed procession to the Sydney Opera House forecourt: *Commissioner of Police (NSW) v Naser* [2025] NSWCA 224 (***Naser***) at [11], [14].

60 The third scenario is where the notice was served on the Commissioner, but less than seven days before the proposed assembly, and an order is obtained from the Court under s 26 authorising the holding of the assembly: s 23(f)(ii).

61 In practical terms, if the Form 1 notice is served on the Commissioner more than seven days in advance of the proposed assembly and the Commissioner wishes to obtain orders prohibiting the assembly, the onus falls on the Commissioner to bring proceedings in court to obtain a prohibition order. Otherwise the default position is that the assembly will be authorised. If the notice is served, but not seven days before the proposed assembly, unless the Commissioner provides notice of non-opposition, the onus falls on the organiser of the assembly to obtain a court authorisation if the organiser wishes to obtain the benefits of authorisation.

62 As the plaintiffs in the present matter emphasised, the scheme for the consideration of authorisations and prohibitions under the *Summary Offences Act* and the predecessor Act, whether by way of non-objection by the Commissioner or through judicial determination (by the granting of authorisation or the refusal to make a prohibition order), allows for a balancing of the different, and often competing, interests of public policy that may be at play in relation to any given public assembly. These include, on the one hand, the important democratic rights of free speech and public assembly and, on the other, privacy, preservation of property, public health, public order and public safety: *Lees* at [38]; *Padraic Gibson (on behalf of the Dungay family) v Commissioner of Police (NSW Police Force)* (2020) 102 NSWLR 900; [2020] NSWCA 160 (***Gibson***) at [7].

63 In *Naser* this Court held at [37] that when the Court is dealing with an application for a prohibition order it is obliged to consider such competing public policy considerations:

> The Act does not specify the criteria by reference to which prohibition orders may be made pursuant to s 25. The jurisprudence which has developed in the application of this Act establishes that the Court must weigh the important democratic right of free speech and public assembly against competing public policy considerations. Competing public policy considerations may include rights to privacy (*Rintoul*) and preservation of property, considerations of public health or public order (*Bassi; Padraic Gibson (on behalf of the Dungay family) v Commissioner of Police (NSW Police Force)* [2020] NSWCA 160), and considerations of public safety (*NSW Commissioner of Police v Keep Sydney Open Ltd* [2017] NSWSC 5).

64 The significance of freedom of assembly within the scheme for authorisation of proposed assemblies was recognised in 1979 in the second reading speech for the Bill which became the *Public Assemblies Act 1979* (NSW) (New South Wales Legislative Assembly, *Parliamentary Debates* (Hansard), 23 April 1979 at 4920-1):

> … an extensive and well recognized right to lobby or protest by way of assembly and/or procession is one of the fundamental bastions of any true democracy. The extent of that right in this State at present is far from adequate, being limited, as it is, both by undue emphasis being placed upon relatively arbitrary bureaucratic regulation and by the existence of quite unnecessary and repressive penal sanctions. An essential part of the democratic process must be the existence of reasonable opportunity for individuals and minority groups to bring their views to the attention of the general public.
>
> To suggest that any such opportunity is adequately afforded via avenues of the established news media and/or the chambers of the recognized political parties is quite unrealistic. Likewise, to contend that such assemblies or processions should be confined to forums away from public inconvenience is to remove for all practical purposes, in many instances, the opportunity to convey their view-points to members of the general public who do not happen to be at such forums at the relevant time.

65 Importantly for the purposes of the plaintiffs' challenge to the impugned provisions, the scheme under Pt 4 of the *Summary Offences Act* facilitates a process of consideration of the pros and cons of a *particular* proposed assembly before it occurs. The requirements of notification mean that where notice is given, the relevant assessing authority, whether it be the Commissioner or the Court, will be in a position to understand the character of the particular proposed assembly and any competing public interest considerations that might arise from the proposal. The evaluative assessment which is then required is individually focused, taking into account the proposed timing of the assembly, its proposed route of procession and estimated number of participants, and is necessarily directed to those particular, known considerations.

66 The point is illustrated by the reasoning in *Naser*. The decisive consideration, leading to a prohibition order being made, was the extreme risk to public safety (including to participants in the assembly as well as to other members of the public) in light of the estimated number of participants and size of the ultimate destination of the procession and its physical restrictions in terms of access for safety vehicles and egress for participants: *Naser* at [62]-[77]. The Court was only able to reach the conclusion that free speech considerations were outweighed by safety concerns after a careful consideration of detailed evidence about the particular assembly and procession that was proposed to occur.

67 The absence of an "authorisation" under Pt 4 of the *Summary Offences Act* (as opposed to the presence of a prohibition order) does not render a public assembly unlawful. Nor does the status of authorisation signify an unqualified immunity from legal consequences. The significance of a public assembly being an "authorised public assembly" is the conferral of a more qualified immunity under s 24 from criminal liability in respect of public order provisions of the kind that are apt to apply to the conduct of an assembly. Section 24 provides as follows:

> If an authorised public assembly is held substantially in accordance with the particulars furnished with respect to it under section 23(1)(c) or, if those particulars are amended by agreement between the Commissioner and the organiser, in accordance with those particulars as amended and in accordance with any prescribed requirements, a person is not, by reason of any thing done or omitted to be done by the person for the purpose only of participating in that public assembly, guilty of any offence relating to participating in an unlawful assembly or the obstruction of any person, vehicle or vessel in a public place.

68 Such immunity is of particular significance when it comes to such matters as obstructing other pedestrians and traffic. A number of offence provisions are potentially engaged by the acts done by people for the purpose of participating in public assemblies, particularly where a procession of a crowd is involved. Section 6 of the *Summary Offences Act* is one such public order offence. It provides as follows:

> **6 Obstructing traffic**
>
> A person shall not, without reasonable excuse (proof of which lies on the person), wilfully prevent, in any manner, the free passage of a person, vehicle or vessel in a public place.
>
> Maximum penalty—4 penalty units.

69 Another example is reg 236 of the Road Rules 2014 (NSW), which relevantly provides:

> **236 Pedestrians not to cause a traffic hazard or obstruction**
>
> (1) A pedestrian must not cause a traffic hazard by moving into the path of a driver.
>
> **:** Maximum penalty--20 penalty units.
>
> (2) A pedestrian must not unreasonably obstruct the path of any driver or another pedestrian.
>
> **:** Maximum penalty--20 penalty units.
>
> (3) For subrule (2), a pedestrian does not unreasonably obstruct the path of another pedestrian only by travelling more slowly than other pedestrians.
>
> …
>
> (7) In this rule-- "road" includes any shoulder of the road, and any median strip, painted island or traffic island, but does not include any other road related area.

70 It was common ground between the parties to the present matter that, where a public assembly is authorised within the meaning of the Act and conducted substantially in accordance with the particulars furnished to the Commissioner, the immunity conferred by s 24 of the *Summary Offences Act* means that a participant in the assembly who obstructs another person or vehicle on a public road or in a public place will not commit an offence, whereas in the absence of authorisation an offence would be committed. This is a matter of considerable practical significance. It was an agreed fact in the present case that "[d]emonstrations, protests, processions and organised assemblies have the potential to obstruct persons in the vicinity, including by virtue of the number of participants in the demonstration or protest occupying the public place".

71 The presence or absence of authorisation for an assembly under the *Summary Offences Act* also has significance for the operation of *LEPRA*, which we address in the next section of our reasons.

72 The immunity conferred by s 24 is not complete. There remains scope for the operation of laws dealing with miscreant behaviour that can potentially occur in connection with a public assembly, including violence, damage to property and serious public disorder. In *Commissioner of Police v Rintoul* [2003] NSWSC 662 (***Rintoul***), Simpson J, made the following observations about the limits of the immunity conferred by s 24:

> [24] … An authorised assembly would protect participants only if the assembly were held substantially in accordance with the application. It does not protect against criminal prosecution of any person who engages in acts of violence or vandalism in that assembly. I observe that the Act gives me no power to do other than grant or refuse the orders sought. I am not empowered to impose conditions upon the conduct of any assembly that goes ahead but such an assembly should be in accordance with the law and participants should be aware of the very limited nature of the protection that the Act affords them.

73 Section 24 of the *Summary Offences Act* has been held not to provide a participant in an assembly with immunity from prosecution for offensive conduct, although the plaintiffs submitted that there remains an open question about the extent to which s 24 may provide immunity in some circumstances for some conduct that would be capable of constituting offensive conduct: see *Commissioner of Police v Allen* (1984) 14 A Crim R 244 at 247 (Hunt J); see also *Gibson* at [13]; *Tey v New South Wales* (2023) 375 FLR 437; [2023] NSWSC 266 at [78]-[79]; *Stratton v State of New South Wales; Pandolfi v Minister for Health and Medical Research* (2023) 112 NSWLR 1; [2023] NSWSC 396 at [69].

Law Enforcement (Powers and Responsibilities) Act 2002 (NSW) – Prior to the Amending Act

74 The long title of *LEPRA* describes it as: "[a]n Act to consolidate and restate the law relating to police and other law enforcement officers' powers and responsibilities; to set out the safeguards applicable in respect of persons being investigated for offences; to repeal certain Acts and to consequentially amend other Acts; and for other purposes".

75 Part 14 is headed "Powers to give directions" and contains provisions authorising police to give directions to people in public places subject to certain limitations. A "public place" is defined in s 3 as follows:

> ***public place*** includes—
>
> (a) a place (whether or not covered by water), or part of premises, that is open to the public or is used by the public, whether or not on payment of money or other consideration, whether or not the place or part is ordinarily so open or used and whether or not the public to whom it is open consists only of a limited class of persons, and
>
> (b) a road or road related area, but does not include a school.

This definition aligns with the definition of "public place" in s 3 of the *Summary Offences Act,* but adds "a road or road related area".

76 The provisions in Pt 14 conferring powers on police officers to give directions were introduced in 1998 by the *Crimes Legislation (Police and Public Safety) Act 1998* (NSW), as part of the now repealed Pt 5 of the *Summary Offences Act*. The provisions were recently discussed in some detail by Mitchelmore JA in *Lees*. Her Honour observed at [42] that:

> In the second reading speech, the then-Police Minister described the provisions as aimed at enabling police to "control antisocial behaviour in public places", and "disperse persons before a situation gets out of hand": New South Wales Legislative Assembly, *Parliamentary Debates* (Hansard), 28 April 1998 at 3970.

77 Under s 197(1) of *LEPRA*, a police officer may relevantly "give a direction to a person in a public place if the police officer believes on reasonable grounds that the person's behaviour or presence in the place":

(a) is obstructing another person or persons or traffic: s 197(1)(a);

(b) constitutes harassment or intimidation of another person or persons: s 197(1)(b); or

(c) is causing or likely to cause fear to another person or persons (so long as the relevant conduct would be such as to cause fear to a person of reasonable firmness): s 197(1)(c).

78 A direction under s 197(1) must be reasonable in the circumstances for the purpose of, relevantly, reducing or eliminating the obstruction, harassment, intimidation or fear: s 197(2). By s 198A, a police officer may issue a direction under Pt 14 to persons comprising a group.

79 Under s 199 of *LEPRA*, a failure to comply, without reasonable excuse, with a direction given in accordance with Pt 14 is an offence, provided it is established that the person persisted, after the direction concerned was given, to engage in that or any other relevant conduct.

80 Section 200 operates to confine the scope of the powers otherwise conferred by Pt 14 to give a direction. Pt 14 does not authorise a police officer to give a direction in relation to an industrial dispute: s 200(1). Section 200(2) provides that the police powers to give directions under Pt 14 do not apply in relation to an apparently genuine demonstration or protest, a procession or an organised assembly. However, that exclusion is itself subject to exceptions. Focusing only on the provisions that existed prior to the *Amending Act*, the exceptions mean that, despite s 200(2):

(1) if a police officer believes on reasonable grounds that a direction is necessary to deal with a "serious risk to the safety of the person to whom the direction is given or to any other person", then a direction under Pt 14 may be given even in relation to an apparently genuine demonstration or protest, a procession or an organised assembly: s 200(3);

(2) a direction may be given in relation to a demonstration, protest, procession or assembly that is obstructing traffic, if it is not an assembly that is authorised under Pt 4 of the *Summary Offences Act* and being held substantially in accordance with such authorisation, the officer in charge at the scene has authorised the giving of directions and the direction is limited to the persons who are obstructing traffic: s 200(4); and

(3) a direction may be given under Pt 14A in relation to a demonstration, protest, procession or assembly in or near places of public worship where certain circumstances exist (including that it is not an authorised assembly under Pt 4 of the *Summary Offences Act*) and blocking, impeding, hindering, harassment, intimidation or threats of a certain kind is occurring: s 200AA.

81 Thus, in the pre-amendment regime, where an apparently genuine public assembly, protest, procession or organised assembly was an "authorised" public assembly under Pt 4 of the *Summary Offences Act*, the powers of police to issue directions under Pt 14 *LEPRA* were effectively limited to circumstances of "serious risk of safety" under s 200(2). The ability to issue directions in those circumstances, even in the case of genuine protest activity, was introduced in 2016 in response to protest activities at mines and other work sites that were seen as being particularly dangerous for protesters, workers and emergency workers: see second reading speech for the Inclosed Lands, Crimes and Law Enforcement Legislation Amendment (Interference) Bill 2016 (NSW) (New South Wales Legislative Assembly, *Parliamentary Debates* (Hansard), 8 March 2016 at 7029).

82 One of the significant effects of authorisation under Pt 4 of the *Summary Offences Act* was to disapply the power to issue directions to persons obstructing traffic. That is a matter of considerable practical significance for the conduct of public assemblies, given the frequency with which crowds gather and march on roads.

The impugned provisions

83 The *Amending Act* made amendments to a number of Acts, including in relation to hate speech and the regulation of firearms. Those amendments are not the subject of challenge and it is unnecessary to say anything more about them. The impugned provisions involve the insertion of the new PARD scheme in the *TPP Act* and amendments to the *Summary Offences Act* and *LEPRA* which alter the operation of those Acts when a PARD is in place.

Part 2 Division 3A of the TPP Act

84 Section 23B of the *TPP Act*, inserted as part of a new Pt 2 Div 3A by the *Amending Act*, applies if an authorisation is given under s 6 or a declaration is made under Pt 2AAA: s 23B(1). The existence of an authorisation or declaration of this kind enlivens the power to make a PARD, but once that power is enlivened there is no need for the power to be exercised only for the narrow purposes to be served by the underlying authorisation or declaration. The PARD scheme has a broader and more flexible operation. As Mr Hume SC, who appeared with Ms Graham, Mr Hawila and Mr Bell for the plaintiffs, correctly submitted, the authorisation or declaration is a condition precedent but that is the end of the significance of the authorisation or declaration.

85 Section 23B(2) provides:

> (2) The Commissioner of Police or a Deputy Commissioner of Police may, by written instrument, make a declaration (a ***public assembly restriction declaration***) that an area described in the declaration is an area in which the authorisation of the holding of public assemblies is restricted.
>
> **Note—**
>
> See section 23F, which provides for Ministerial concurrence or confirmation of the making of the public assembly restriction declaration.

86 There is no scope under this provision for limiting a PARD to particular assemblies or types of assemblies. The only variable is the area to which the declaration applies. Within the area, the effect of a PARD is that the authorisation of the holding of all public assemblies is restricted.

87 A PARD may only be made within 14 days after the making of an authorisation under s 6 or a declaration under Pt 2AAA: s 23B(3)(b). The critical precondition to the making of a PARD is the formation of a state of satisfaction of the kind described in s 23B(3)(b). A PARD may be made

> (b) only if the Commissioner or Deputy Commissioner making the declaration is satisfied that the holding of public assemblies in the area to which the declaration applies would be likely to cause
>
> (i) a reasonable person to fear —
>
> (A) harassment, intimidation or violence, or
>
> (B) for the person's safety, or
>
> (ii) a risk to community safety, including the safety of participants in public assemblies in the area.

88 As noted above, a PARD may be made, extended or varied only with the concurrence of the Police Minister: s 23F(1). There is an exception if the Police Minister is not able to be contacted when the declaration is made, extended or varied (s 23F(2)), although in such circumstances the Police Minister must be notified and the PARD, or the extension or variation of the PARD (as the case may be) will cease to have effect if not confirmed by the Minister within 48 hours.

89 A PARD may be extended by a Commissioner or Deputy Commissioner for a period of no more than 14 days, if the Commissioner or Deputy Commissioner is satisfied that the PARD continues to be necessary on the grounds referred to in s 23B(3)(b): s 23C(1). There may be multiple extensions, but a PARD cannot be in force for an aggregate period of more than 90 days: s 23C(2).

90 A PARD may also be varied under s 23D, if the Commissioner or Deputy Commissioner is satisfied the grounds referred to in s 23B(3)(b) apply to the area as varied. A PARD may be revoked under s 23G.

91 A PARD commences when the declaration under s 23B(2) is made and ends 14 days later, unless the declaration is extended under s 23C, ceases to have effect under s 23F(3)(b), or is revoked under s 23G: s 23B(4).

Sections 27A and 27B of the Summary Offences Act

92 Schedule 5 of the *Amending Act* inserted ss 27A and 27B into Pt 4 of the *Summary Offences Act*. A public assembly cannot be an authorised public assembly under s 23, or be authorised by a Court order under s 26, if the assembly will be held or partly held in an area to which a PARD applies during the time the PARD is in force: s 27A(1). There is an exception for public assemblies that form part of industrial action, an industrial dispute or an industrial campaign: s 27A(2). We agree with the submission of the plaintiffs that the effect of s 27A(1) is to deny the prospect of authorisation for an assembly if any part of the assembly, which would include any procession, covers an area to which a PARD applies.

93 Section 27B applies if, before a PARD was made or extended, a public assembly in the area the subject of the PARD was authorised to be held on a date on which the PARD is in force: s 27B(1). In such circumstances the authorisation of the assembly is taken to be revoked and the Commissioner or Deputy Commissioner must take reasonable steps to notify the organiser of the assembly that it has ceased to be authorised: s 27B(2) and (3).

Section 200(5) of LEPRA

94 Schedule 4 of the *Amending Act* inserted s 200(5) into LEPRA:

> (5) A police officer is not precluded from giving a direction in relation to a demonstration, protest, procession or assembly referred to in subsection (2)(a)–(c) if the demonstration, protest, procession or assembly is being held in an area the subject of a public assembly restriction declaration made under the *Terrorism (Police Powers) Act 2002*, Part 2, Division 3A while the declaration is in force.

95 Section 200(5) disapplies, in a PARD area, the limitation on police powers that is otherwise provided by s 200(2) in a PARD area. As a result a police officer is empowered to give directions in respect of apparently genuine demonstrations, protests, processions or public assemblies held within a PARD area. This includes giving a move on direction when the officer has a reasonably held belief that a person is either obstructing another person or persons, obstructing traffic, or harassing or intimidating another person or persons, or is causing or likely to cause fear to another person or persons (if the relevant conduct would be such as to cause fear to a person of reasonable firmness).

The established test of validity

96 The implied freedom in the Constitution relevantly limits the power of Commonwealth and State parliaments in passing laws which impose a burden on the freedom of communication about government and political matters: *Lange*. The implied freedom is "essential to the maintenance of the system of representative and responsible government for which the Constitution provides" in ss 7, 24, 64 and 128: *Brown* at [88]. The implied freedom gives effect to the political sovereignty reposed in the people by the system of representative and responsible government established by the Constitution: *Unions NSW v State of New South Wales* (2013) 252 CLR 530; [2013] HCA 58 (***Unions (No 1)***) at [17]-[26]. The limitation operates to limit the powers of a State parliament, including in relation to communication about principally State matters: *Unions (No 1)* at [17]-[26].

97 The implied freedom is not absolute and it does not entail freedom from all regulation or restraint. The freedom exists only as an incident of the system of representative and responsible government provided for by the Constitution and it limits legislative and executive power "only to the extent necessary for the effective operation of that system": *Brown* at [313] per Gordon J. Validity falls to be determined by reference to the effect of the law on political communication as a whole: *Comcare v Banerji* (2019) 267 CLR 373; [2019] HCA 33 at [20].

98 The inquiry for determining whether an impugned law infringes the implied freedom is "orthodox and familiar" (*Ravbar v Commonwealth* (2025) 99 ALJR 1000; [2025] HCA 25 (***Ravbar***) at [27]). It requires the Court to address three questions:

(1) Does the impugned law effectively burden the freedom in its terms, operation or effect? If not, the law is valid and no further question arises.

(2) If "yes" to question 1, is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government? If the answer is no, the law is invalid.

(3) If "yes" to question 2, is the law reasonably appropriate and adapted to advance that legitimate object in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government? If the answer is no, the law is invalid.

99 As to the endorsement of these three questions as the binding approach, see *McCloy v State of New South Wales* (2015) 257 CLR 178; [2015] HCA 34 at [2] (***McCloy***) (French CJ, Kiefel, Bell and Keane JJ); *Brown* at [102]-[104] (Kiefel CJ, Bell and Keane JJ), [162]-[163] (Gageler J), [237] (Nettle J), [316]-[325] and [481] (Gordon J); *Clubb* at [5] (Kiefel CJ, Bell and Keane JJ); *LibertyWorks Inc v The Commonwealth* (2021) 274 CLR 1; [2021] HCA 18 at [134] (Gordon J) (***LibertyWorks***).

100 In recent years the appropriate approach to answering the third question has been a matter of considerable debate. The nature and resolution of that debate was summarised by this Court in *Smith v Blanch* (2025) 118 NSWLR 70; [2025] NSWCA 188 in the following terms, at [138]-[140]:

> There has been some division in the High Court as to how the third question, which raises an issue of characterisation, is to be addressed. Over the last decade a majority of the Court had adopted what came to be labelled the "structured proportionality" test: *McCloy* at [2] (French CJ, Kiefel, Bell and Keane JJ); and, eg, *Farm Transparency International Ltd v New South Wales* (2022) 277 CLR 537; [2022] HCA 23 ("***Farm Transparency***") at [29] (Kiefel CJ and Keane J), [250] (Edelman J), [269] (Steward J), [271] (Gleeson J). That test involved addressing three further questions, articulated in *McCloy* at [2] as follows:
>
> > "There are three stages to the test – these are the inquiries as to whether the law is justified as suitable, necessary and adequate in its balance in the following senses:
> >
> > *suitable* – as having a rational connection to the purpose of the provision;
> >
> > *necessary* – in the sense that there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom;
> >
> > *adequate in its balance* – a criterion requiring a value judgment, consistently with the limits of the judicial function, describing the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom." [Emphasis in original, citations omitted.]
>
> The plurality in *McCloy* referred to proportionality being characterised "as an analytical tool rather than as a doctrine" (at [72]). It came to be applied by a majority of the Court as the primary tool employed in cases involving the implied freedom. In recent decisions of the High Court the position has evolved somewhat. In *Farm Transparency* Gordon J said that "the 'three-part test' of suitability, necessity and adequacy, applied by the plurality in *McCloy v New South Wales*, is a tool of analysis that may be of assistance", but it "is not always ... necessary or appropriate to undertake all steps of that analysis" (at [172]). In *Babet v Commonwealth* [2025] HCA 21; (2025) 99 ALJR 883, Gageler CJ and Jagot J similarly said the following (at [49]), with the agreement of Gordon and Beech-Jones JJ (at [72] and [242] respectively):
>
> > "[In *Lange*] the Court recognised that the different formulations used to ascertain if the implied freedom had been infringed were immaterial to the legitimacy of the constitutional implication so that there was 'no need to distinguish' between those formulations. Structured proportionality can be a way of organising reasons and explaining the basis on which a conclusion is reached in a particular case as to whether a legislative provision is reasonably appropriate and adapted to advance a legitimate purpose that is consistent with the maintenance of the constitutionally prescribed system of government. The flexible application of all or any of the steps of structured proportionality is to be understood as a 'tool of analysis', express or ritual invocation of which is by no means necessary in every case." [Citations omitted.]
>
> This view was echoed in *Ravbar v Commonwealth* [2025] HCA 25; (2025) 99 ALJR 1000 ("***Ravbar***"): at [29] (Gageler CJ), [343] (Jagot J) and [427] (Beech-Jones J); cf [218]-[225] (Edelman J) and [290]-[291] (Steward J). In that case Gleeson J noted, by reference to earlier authority, that the persuasive burden to justify any restriction of the implied freedom falls upon the party defending the law, but added that "the scope of that task is affected by the contentions" of the challenger (at [309]). Her Honour explained that in that case the parties had framed their argument by reference to the structured proportionality approach, and it had not been suggested that it was inapposite to the matter, so her Honour considered and applied that approach (at [309]-[316]; see similarly Beech-Jones J at [427]).

In the present case reference was made in the course of argument to aspects of the structured proportionality approach. As explained below, we have found it appropriate to resolve the present matter with only limited reference to structured proportionality analysis.

The burden imposed on the freedom of political communication by the impugned provisions

101 As the State properly conceded, the impugned provisions impose a burden on the freedom of political communication. The relevant burden is the incremental effect of the impugned provisions on the freedom to engage in a form of political communication which may already be validly restricted: see *Farm Transparency* at [37]; *Brown* at [109], [181], [188], [259], [262], [357], [420], [556]-[558]. The extent of the burden is therefore to be measured by reference to the restraints which the law already imposes, and not by reference to a notional state of absolute freedom.

102 Both parties properly approached this question by treating the scheme for authorisation of public assemblies (subject to various prohibitions and limitations) as it existed prior to the *Amending Act*, as well as the un-amended operation of Pt 14 of the *LEPRA* in relation to public assemblies (both authorised and not authorised) as the relevant baseline against which to measure the burden on freedom of political communication created by the *Amending Act*.

103 One critical feature of this baseline scheme was that it allowed a mechanism for organisers of public assemblies to seek a measure of legal protection for the conduct of such assemblies. We have explained above the nature of the legal protection conferred by authorisation under Pt 4 of the *Summary Offences Act*. It bears repeating that the immunity afforded to authorised assemblies was far from absolute. A balance was struck in the pre-existing law between, on the one hand, authorised conduct that was made immune from laws that might otherwise apply to disruptive conduct in public places and, on the other, conduct that remained unlawful in the interests of preserving the public interest in such matters as physical safety, protection from intimidation and offensive conduct, protection of property and preserving freedom of movement.

104 The plaintiffs point in this regard to various offence provisions which continue to apply and constrain the conduct of public assemblies, even when authorised under Pt 4. These include the following offence provisions:

(1) under the *Summary Offences Act,* offensive conduct (s 4), offensive language (s 4A) and violent disorder (s 11A);

(2) under the *Crimes Act 1900* (NSW), riot (s 93B), affray (s 93C), incitement of violence on the grounds of race, religion, sexual orientation, gender identity or intersex or HIV/AIDS status (s 93Z), publicly inciting hatred on ground of race (s 93ZAA), display of Nazi symbols (s 93ZA);

(3) under the *Anti-Discrimination Act 1977* (NSW), inciting hatred towards, or serious contempt for, or severe ridicule of, a person or group of persons on the ground of race (s 20C); and

(4) under the *Criminal Code* (Cth), advocating force or violence against a targeted group that is distinguished by race, religion, sex, sexual orientation, gender identity, intersex status, disability, nationality, national or ethnic origin or political opinion (s 80.2A) or advocating the use of force or violence against a person on such grounds (s 80.2B), advocating terrorism (s 80.2C), advocating genocide (s 80.2D) and public display of prohibited Nazi symbols or giving the Nazi salute.

105 Legislation must be assessed according to its legal operation and practical effect: *Lange* at 567. The impugned provisions operate by denying the possibility of public assemblies in declared areas the possibility of authorisation under Pt 4 of the *Summary Offences Act*, and thereby denying the possibility of qualified statutory immunity under s 24 of the *Summary Offences Act*. The result is to make participating in an affected public assembly a more legally precarious activity. Participants are put into a state of materially greater legal jeopardy than would not exist if authorisation were obtained under Pt 4 of the *Summary Offences Act.*

106 As the State correctly points out, authorisation is never guaranteed under Pt 4 and it is always contingent on the provision of a compliant and timely notice of a proposed assembly and the lack of any prohibition order from the Court. Nevertheless, the practical effect of foreclosing that option altogether is to make it less likely that people will organise and participate in public assemblies that are within, or even partly within, an area covered by a PARD. That is, of course, why the legislature chose this technique to bring about the desired outcome of discouraging people from engaging in public assemblies in declared areas.

107 There is an additional aspect to the amendments to the *LEPRA* which adds to the burden. This involves the operation of the powers conferred on police officers to give directions under Pt 14 of *LEPRA*, as modified by s 200 of that Act. We have described above the position prior to the *Amending Act*. In the case of an apparently genuine demonstration or protest, a procession, or an organised assembly, there was generally no power to give directions, except in cases of serious risk to the safety of particular persons or where an unauthorised assembly was obstructing traffic. As a result, the usual power conferred on a police officer under s 197 to give a direction to a person if that person was obstructing another person, or engaging in conduct that constituted harassment or intimidation of other persons, or causing fear to another person or persons, did not apply in the context of a public assembly that met the description of being an apparently genuine demonstration or protest, a procession, or an organised assembly. However, s 200(5) of the *LEPRA*, which was introduced by the *Amending Act*, has the effect that the powers to make directions conferred by s 197 are available to assemblies occurring within a PARD declared area. This reinforces the legal precariousness of participating in such an assembly, as compared with the situation that applied before the *Amending Act*.

108 To take the most conspicuous example, a police officer under s 197 of *LEPRA* could issue a direction to a participant or group of participants in a public assembly within a PARD area if they were obstructing another person or persons. Failure to comply with such a direction, without reasonable excuse, is an offence under s 199 of the Act. It is to be expected that many public assemblies will, of their nature, cause the obstruction of non-participants in the vicinity. An obstruction may occur by blocking or making it difficult for a person to pass through a particular area: *Lees* at [56]. The risk of being subject to an order under s 197 of *LEPRA*, and thereby becoming potentially guilty of an offence under s 199, presents a substantial impediment to holding any form of public assembly within a PARD area.

109 Mr Lim SC, who appeared with Ms Ryan and Mr Khadra for the State, submitted that the burden imposed on freedom of political communication by the impugned provisions is confined. The State drew attention to the temporal and geographical dimensions of any burden. As to the former, a PARD will initially last for only 14 days. Although it can be extended, the maximum duration is 90 days. As a result, the State submits, the period of time within which assemblies are restricted is necessarily confined and will come to a predictable end.

110 The State relatedly emphasised that the conditions for the making of a PARD are exceptional. The circumstances apt to enliven the power to give an authorisation under s 6 of the *TPP Act* are narrow and cannot be expected to arise routinely. So too the conditions for making a declaration under Pt 2AAA of the *TPP Act*, as illustrated by the fact that no such declaration has been made to date. Moreover, the State submits, even where such an authorisation or declaration has been made, a PARD can only be made where the circumstances in s 23B of the *TPP Act* exist and the Commissioner or Deputy Commissioner (with the concurrence of the Police Minister) decides to make a PARD.

111 The State also points to the fact that even where a PARD is in place, there is no prohibition per se on public assemblies, even if assemblies within a PARD declared area will be subject to a more exacting set of laws and police powers. As the State correctly observes, various public assemblies were in fact held in and around Sydney after the PARD was made, which illustrates that there remained scope for lawful forms of political communication through public assemblies notwithstanding the *Amending Act.*

112 In terms of geographical reach, the State submits that a PARD will only be made in respect of an area to which the Commissioner or Deputy Commissioner's state of satisfaction under s 23B(3)(b) applies, which tends to confine the scope of the likely application of any PARD.

113 The State's submissions as to geographical reach are undercut by the breadth of the PARD made on 24 December 2025. While it was later varied to reduce the area of application, the PARD as first made applied to large swathes of the suburbs surrounding Sydney in each direction, as well as all of the CBD. The potential for a far-reaching PARD of this kind is reinforced by the point we develop in the next section of our reasons about the broad meaning of "community safety" in s 23B(3)(b) of the *TPP Act*. The PARD scheme is not concerned only with managing the risks to safety that might arise in the immediate vicinity of a public assembly. It is also concerned with broader impacts in the community which may be well removed from the site of any particular assembly. This in turn raises the prospect of geographically expansive PARDs like the one made on 24 December 2025, reflecting an assessment that the safety of the community as a whole may be endangered by a public assembly of any kind anywhere in or around Sydney. Any PARD encompassing the Sydney CBD is also bound to exclude the authorisation of public assemblies at most or all of the locations perceived as significant for the holding of such assemblies. As we have explained above, those locations are often chosen for important logistical and symbolic reasons, and restricting assemblies at such locations has a particular burden on effective political communication.

114 As for the limited duration of any PARD, it may be accepted that a short-term restriction imposes less of a burden on the freedom of political communication than a permanent restriction or a restriction of longer duration. But it does not follow that a short-term period of discouragement of public assemblies imposes only a slight or insignificant burden on the freedom of political communication. The comprehensive nature of the burden is significant in this respect – any public assembly of any size or kind for any purpose is caught by a PARD, when it applies. It is also important to recall the significance of timing to effective political communication. Even a short-lived PARD may make it practically impossible to organise a politically effective public protest in response to an event that occurs while the PARD is in force. To return to the example of "Invasion Day" protests on 26 January, a restriction on the conduct of assemblies that applies on that day is one that imposes a heavy burden on people who wish to engage in political communication on that significant and symbolic date, an opportunity which will only arise once per year.

115 A similar answer applies to the State's submission drawing attention to the fact that PARDs operate to restrict public assemblies, but without prohibiting them. While this is legally accurate, it does not follow that the impugned provisions have no disinhibiting effect on public assemblies. The very purpose of the impugned provisions is to discourage public assemblies within PARD declared areas by materially increasing the legal risk for participants in such assemblies. That conclusion is not avoided by pointing out that the change does not amount to a total prohibition. Again, it may be accepted that a prohibition would impose a more onerous burden on freedom of political communication, but it does not follow that the burden imposed by the chosen restrictions is slight or insubstantial.

116 The extent of the burden imposed on the freedom of political communication becomes relevant to later steps in the assessment of constitutional validity: *Brown* at [90]. The measure of justification in any given case is calibrated to the nature and intensity of the burden imposed on the freedom of political communication: *Tajjour v State of New South Wales; Hawthorne v State of New South Wales; Forster v State of New South Wales* (2014) 254 CLR 508; [2014] HCA 35 (***Tajjour***) at [151]; *Brown* at [164]. A law with respect to the prohibition or restriction of political communications will be more difficult to justify than a law with respect to some other subject matter, where the effect on communications is incidental and unrelated to their nature as political communications: *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 169; [1992] HCA 45; *Hogan v Hinch* (2011) 243 CLR 506; [2011] HCA 4 at [95]-[96]; *Wotton v State of Queensland* (2012) 246 CLR 1; [2012] HCA 2 (***Wotton***) at [30]. The impugned provisions fall into the former category. As such, close scrutiny of the justification for the impugned provisions is demanded: *Brown* at [165], [203].

117 For the above reasons, the first of the three questions identified at [98] above must be answered in the affirmative. This leads to the second question which is concerned with the legitimacy of the purpose of the impugned provisions.

The purpose of the impugned provisions and the constitutional legitimacy of that purpose

118 In determining the purpose of an impugned law for the purposes of testing constitutional validity, ordinary principles of statutory construction apply: *Ruddick v The Commonwealth* (2022) 275 CLR 333; [2022] HCA 9 at [133]. The purpose of a statute, like its meaning, is to be ascertained objectively from the whole text and context: *Brown* at [208]-[209]; *Ravbar* at [43], [120], [459].

119 In *Ravbar* at [41], Gageler CJ explained that the "purpose" of a law is the "end" or "object" of the law. His Honour proceeded to say (references added):

> The purpose is the "public interest sought to be protected and enhanced by the law" [*Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 300]. Most often, … the purpose can be described in terms of what "the law is designed to achieve in fact" [*NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 at [40]], which is the inverse of "the mischief" at which the law is aimed [*APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 332; [2005] HCA 44 at [178]].

120 Purpose in this sense is not to be confused with the motive that any member of Parliament might have for supporting the legislation in question, the means used to achieve the purpose or the foreseeable or actual effect of the legislation enacted for that purpose: *Ravbar* at [173].

121 A matter of some significance in determining the purpose of an impugned law is determining the appropriate level of abstraction, and drawing the necessary distinction between the purpose and the means chosen to achieve that purpose: *Alexander v Minister for Home Affairs* (2022) 276 CLR 336; [2022] HCA 19 (***Alexander v Home Affairs***) at [103]-[105]; *Tajjour* at [163]. The focus should be upon identifying the purpose at the right level of generality to correspond to the mischief to which the provision is directed: *Ravbar* at [173], [459]; *Unions NSW v State of New South Wales* (2019) 264 CLR 595; [2019] HCA 1 (***Unions (No 2)***) at [171]; *LibertyWorks* at [183], [204].

122 In the second reading speech for the bill which became the *Amending Act*, the Minister for Police and Counter-terrorism explained the background to the Amending Act and the perceived need for urgent action. In relation to the new restrictions being introduced in relation to public assemblies the Minister said the following:

> I want to acknowledge the horrific act of antisemitic violence that has brought about this bill's development and introduction into Parliament. Just over a week ago, on Sunday 14 December, a terrorist attack was perpetrated against Jewish members of our community at Bondi Beach, taking 15 innocent lives and injuring 40 others, including two serving police officers. Members of the Jewish community were celebrating Hanukkah, celebrating the triumph of the light over the darkness, celebrating without fear and celebrating in a land that will forever be their home. The actions of those two terrorists have permanently scarred our Jewish community. They have scarred us all. …
>
> We cannot undo the events of that terrible day, but this bill progresses reforms that respond directly to lessons from the atrocities on that day. The Government is taking steps to protect the community and enhance social cohesion in the wake of these terrorist acts by placing sensible limits on the authorisation of public assemblies …
>
> … The bill will further enhance public safety by creating a framework for the issuing of public assembly restriction declarations in extraordinary circumstances. It does this by proposing amendments to the *Terrorism (Police Powers) Act 2002* and the *Summary Offences Act 1988* to provide that, where the use of special powers to investigate or prevent a terrorist act are authorised under part 2 of that Act, a public assembly restriction declaration may be made that prevents public assemblies from being authorised in designated areas. The bill also proposes amendments to the *Law Enforcement (Powers and Responsibilities) Act 2002* to provide that limitations on the use of police move on powers in relation to public assemblies do not apply where an assembly takes place in an area designated by a public assembly restriction declaration.
>
> Community tensions may run high in the immediate aftermath of a terrorist attack like the tragic and horrific incident in Bondi, and ensuring community safety is absolutely paramount. A public assembly held to express support for or denounce a particular community or group, or which relates to a cause that is highly significant for one or both of those community groups, could further inflame tensions and give rise to risks to public safety. The assembly of a large group of people in the aftermath of a terrorist attack can also give rise to a real risk to community safety, including to those participating in the assembly, by making those in the assembly a target and exposing everyone else in the vicinity to a risk of harm.
>
> Large public assemblies on roads and in public places could also obstruct roads or people, including emergency and police vehicles, which can increase the risk to public safety and impact on the ability of emergency services and police to respond to any further or developing risk effectively. In order to reduce these risks and keep the community safe, the bill proposes to create a scheme which would operate to prevent public assemblies from being authorised in designated areas for a defined period of time and allow police to use existing move on powers to address any public assemblies that take place in such an area during that period. As the bill proposes to do so by building upon existing mechanisms in New South Wales legislation on terrorism, public assemblies and law enforcement powers, I will briefly outline these existing laws. …

123 The Minister proceeded to describe the existing powers conferred under the *TPP Act* to authorise the use of special preventative and investigative powers (ss 5 and 6) and to make a declaration authorising the use of force in relation to a declared terrorist act (Pt 2AA). After explaining the existing regime under Pt 4 of the *Summary Offences Act* for the authorisation of public assemblies, and the consequences of such authorisation (including for the operation of s 200 of *LEPRA*), the Minister said:

> The bill proposes amendments to restrict public assemblies in designated areas within the aforementioned framework. Under the model proposed in this bill, within 14 days of a declaration being made under either section 6 or part 2AAA, which authorises the use of special powers under part 2 or part 2AAA of the Terrorism (Police Powers) Act, the Commissioner of Police or Deputy Commissioner of Police will have the option, with the concurrence of the Minister for Police and Counter-terrorism, to make a public assembly restriction declaration or PARD—a declaration that prevents the authorisation of public assemblies in specified areas for a limited time period.
>
> The specified areas do not need to be the same areas that are specified under the Terrorism (Police Powers) Act [TPPA] authorisation of a terrorism act. The areas are to be identified on the basis of risk to community safety should a mass gathering occur. Before making a PARD, the decision-maker must be satisfied that public assemblies in the declared area would be likely to cause a reasonable person to fear harassment, intimidation or violence, or to fear for their safety, or would be likely to cause a risk to community safety, including the safety of participants in any assembly. A PARD commences when it is made and will be in force for an initial period of 14 days, which can be extended no more than 14 days at a time to ensure regular considerations of the need for the restrictions to be continued. Cumulatively, declarations may not be in force for longer than three months.
>
> The making of a PARD will alter the way existing provisions under the Summary Offences Act 1988 and LEPRA operate in relation to public assemblies in designated areas. First, as amended by this bill, part 4 of the Summary Offences Act 1988 will not permit the Commissioner of Police, the District Court or the Supreme Court to authorise a public assembly to take place in areas that are the subject of a PARD for the duration of the declaration. It will also nullify any existing authorisations planned for such areas. Second, the unavailability of authorisations in areas that are the subject of a PARD will mean that participants in unauthorised public assemblies in these areas will not be protected from criminal liability or obstruction offences.
>
> Third, where participants in an unauthorised public assembly in an area that is the subject of a PARD are engaged in conduct that enlivens the use of police move on powers under section 197 of LEPRA, such as conduct that causes an obstruction, involves the harassment or intimidation of others, or which may cause fear in others, police will be able to give move on directions to resolve the conduct of concern, with failure to comply being a criminal offence. The amendments in this bill do not mean that police will be able to issue move on directions in relation to any group of people gathered in a designated area. For example, picnics and groups of friends as well as quiet and ordered vigils that do not breach the LEPRA threshold will still be able to be held.
>
> … In summary, large public gatherings that follow a terrorism event may increase safety risks to the community. These may be divisive, give rise to safety concerns of any perceived targeted community, as well as to those participating in the assembly, and may result in further fear and social disharmony. Public assembly restriction declarations will operate to restrict authorised public assemblies in designated areas for a defined period of time and to allow police to use their existing move on powers in order to enforce the restriction.

124 The following points emerge from this explanation of the bill and its background by the Minister. The government perceived in the wake of the Bondi Beach attack that social cohesion was under threat, and that as a general proposition community tensions may run high in the immediate aftermath of a terrorist attack. Linked to that assessment was a view that public assemblies in such a context were apt to, or at least had the potential to, undermine social cohesion and place the community at risk. This was the mischief to which the amendments concerning public assemblies were directed.

125 The State in its submissions to the Court also relied on a "Statement of Public Interest" which was tabled in connection with the first reading of the bill that became the *Amending Act*. In its explanation of the proposed new scheme authorising restrictions to be imposed on public assemblies the Statement followed the same logic as the second reading speech in describing the perceived mischief and response:

> [I]n the aftermath of terrorist incidents, community cohesion can be fragile. Mass public assemblies, such as protests or demonstrations, may be divisive and can give rise to safety concerns, both for those participating in such assemblies, as well as members of certain community groups that may be perceived to be targeted, and those in the vicinity of large assemblies … Following the terrorist incident at Bondi Beach, community members have highlighted such assemblies and the conduct therein may inflame tensions and further fear and social disharmony, and may pose a risk to public safety.
>
> … Public Assembly Restriction Declarations are a tool which will facilitate general limitations on public assemblies (such as protests) in a designated area that are likely to cause fear of harassment, intimidation, violence, threats to safety; or that pose a risk to community safety. This scheme furthers the public interest in ensuring safety at times of heightened risk following a terrorist incident.

126 The legislation was intended to remedy the identified mischief by conferring the power to impose PARDs that would operate to discourage all public assemblies from being held in any area to which a PARD applied. The second reading speech and the Statement of Public Interest did not put the proposition quite as squarely as this, although in the debate following the second reading speech the Attorney General did:

> The making of a PARD will signal to the community that assembling in public spaces in a designated area is discouraged. Community tensions may run high and emotions run hot in the immediate aftermath of a terrorist attack. Community safety is paramount.

127 This description highlights the link that was implicit in the second reading speech between the mischief described in that speech and the measures introduced in the *Amending Act*. Where a PARD is in place a public assembly cannot be authorised under Pt 4 of the *Summary Offences Act*. It follows that the qualified statutory immunity available under the Form 1 system cannot be obtained and participating in a public assembly becomes a significantly more precarious activity from a legal perspective. Participation in a public assembly is also discouraged by enlivening the powers of police under s 197 of LEPRA to issue directions to respond to such things as obstruction of other persons. The Attorney General therefore captured the essence of the scheme as being intended to discourage people from holding any kind of public assembly within a declared area for the duration of the PARD.

128 The second reading speech alluded in a number of different ways to concepts of "public safety". The Minister described risks to public safety in a conventional sense of danger to the physical wellbeing of members of the community. In this context a link was drawn between the assembly of large groups of people and a risk that some in the community, including those participating in the assembly and people in the vicinity, may become the targets of attack. A related concern was that assemblies may cause obstructions which impede the ability of emergency services to "respond to any further or developing risk effectively". But in describing the purpose of the bill the Minister also used the concept of public safety, and the associated concept of risks to the community, in a broader sense as encompassing risks to the psychological welfare of members of the community and the cohesion of the community generally. In that connection the Minister described the bill as a response to a concern that public assemblies in the aftermath of a terrorist attack may be "divisive" and may result in "further fear and social disharmony". The Minister also referred to a concern that a public assembly held to express support for, or denounce, a particular community or group, or which relates to a cause that is highly significant for one or both of those community groups could "further inflame tensions".

129 Of course, it is important not to read the second reading speech as if it is itself a statute, or otherwise place undue emphasis on the particular language of the second reading speech. The purpose of a statute resides in its text and structure: *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at 592; [2011] HCA 10 at [44]. But that is not to deny the importance of extrinsic materials in identifying the purpose of a law. They are a recognised aspect of the context in which statutory text must be interpreted: *Federal Commissioner of Taxation v Consolidated Media Holdings* (2012) 250 CLR 503 at 519; [2012] HCA 55 at [39]. In *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross* (2012) 248 CLR 378; [2012] HCA 56 at [25], French CJ and Hayne J held that the determination of the purpose of a statute or of particular provisions of a statute may be based upon an express statement of purpose in the statute itself, inference from its text and structure and, where appropriate, reference to extrinsic materials. In *Ravbar* at [45] Gageler CJ held that the purpose of a law must be assessed by reference to context, which includes the "entirety of the parliamentary proceedings which resulted in the enactment of the law". It is undoubtedly legitimate to have regard to secondary materials, including a second reading speech, to identify the mischief to which legislation was directed: *Harrison v Melhem* (2008) 72 NSWLR 380; [2008] NSWCA 67 at [13], [172]; see also *Nominal Defendant v GLG Australia Pty Ltd* (2006) 228 CLR 529; [2006] HCA 11 at [22].

130 The understanding of the purpose of the restriction of public assemblies that we have set out above is confirmed by analysis of the powers conferred in relation to PARDs by the *Amending Act*. Section 23B of the *TPP Act* contemplates that a Commissioner or Deputy Commissioner may be satisfied that the mere "holding of public assemblies", of any kind, in a particular area within the coming 14 days would be likely to cause a risk to "community safety". That is a prospective assessment that is necessarily to be made in the abstract, without any capacity for the Commissioner or Deputy Commissioner to anticipate precisely what kinds of public assemblies are likely to be held or the particular risks to physical safety that they entail. It is, necessarily, an apprehension of risk arising from the mere fact of public assemblies being held, and not from any foreseen characteristic of the way in which any particular assembly is expected to be conducted. That is the trigger for the making of a PARD.

131 The conferral of a power in these terms is only explicable once it is appreciated that the legislature apprehended that a risk to "community safety" can arise simply from public assemblies being held in the aftermath of a terrorist attack, because public assemblies tend to lead to fear, social disharmony, division and inflamed tensions, and these outcomes are considered to be incompatible with community safety. Unless s 23B is read in this way, the whole PARD scheme would be ineffective to address the mischief described in the second reading speech. Both parties in the present matter embraced the notion that where s 23B of the *TPP Act* refers to "community safety" this must include the psychological safety of individuals, and, by extension, the cohesion of the community more broadly. They were correct to do so as a matter of construction. Where a court has identified the target of Parliamentary legislation the proper function of the Court is to see that the target is hit, not merely to record that it has been missed: *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 424D, quoting Lord Diplock writing extrajudicially in "The Courts as Legislators" in Brian W Harvey, *The Lawyer and Justice* (Sweet & Maxwell, 1978) at 274.

132 This conclusion has significance for the State's submission that the power to make a PARD is "tightly confined". The State argues that the power is so tightly confined that any burden on the implied freedom is slight and the power to make a PARD can be shown to be "justified across the range of potential outcomes of the exercise of that discretion": *Palmer v State of Western Australia* (2021) 272 CLR 505; [2021] HCA 5 at [123] (***Palmer***). The submission has a number of dimensions, including that s 23B of the *TPP Act* will only be enlivened in "extremely rare" circumstances because of the limited scope of the power to make authorisations under s 6 of the *TPP Act* and declarations under Pt 2AA of the *TPP Act*. The State also points to the nature of the matters about which the Commissioner or Deputy Commissioner must be satisfied under s 23B(3)(b). On the latter point, once it is appreciated that "community safety" is used in a very broad sense in s 23B(3)(b), there is considerably less force in the submission that a PARD could only be made in a narrowly confined set of circumstances. As it is open to the Commissioner or Deputy Commissioner to consider the risk to the psychological safety of others in the community posed by the holding of public assemblies, there is in fact much latitude in the formation of that evaluative judgment.

133 The State submitted that the purpose of the impugned provisions was to protect the community and enhance social cohesion, specifically by "respond[ing] to social disharmony wrought by mass demonstrations perceived to be directed at particular community groups in the aftermath of a terrorist act when social cohesion is particularly fragile". The chosen means to achieve such social cohesion, according to the State, was "placing sensible limits on the authorisation of public assemblies". Where a PARD is in force, however, the legislation does not operate to "limit" authorisation of public assemblies but to foreclose any authorisation.

134 The State's submission that the purpose of the law was to protect the community from perceived risks to social cohesion, and the threat of division captures part of the purpose of the Act, but not all of it. As the State appears to have accepted, it is not sufficient to stop there without also recognising the object of preserving social cohesion *by* addressing the risk posed to social cohesion by the holding of public assemblies. To characterise the purpose of the *Amending Act* as being to support social cohesion would be too abstract. It is only one step short of describing the law as being for the peace, order and good government of the State: see *Alexander v Home Affairs* at [103]. As recognised in *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 332; [2005] HCA 44 at [178], quoted in the passage we have set out above from *Ravbar*, the purpose of a law – being what it is designed to achieve – is the inverse of the mischief at which the law is aimed. Once it is appreciated that the mischief was the harm to social cohesion being caused *by public assemblies*, the impugned provisions can be seen to have had the purpose of discouraging public assemblies within a PARD area, so as to address that mischief.

135 It would likewise be incomplete to say that the purpose of the *Amending Act* is to restrict or discourage public assemblies. That would only beg the question – why is it in the public interest to restrict or discourage public assemblies? Viewed in those terms there would be nothing to distinguish the purpose of the *Amending Act* from a law enacted during the COVID-19 pandemic to restrict public gatherings for public health reasons. The reason for identifying the purpose of a law in this context is to provide a meaningful basis for testing constitutional legitimacy: *Alexander v Home Affairs* at [104]. Abstraction to that degree would not assist.

136 The purpose of the impugned provisions is to restrict public assemblies in order to protect social cohesion by avoiding the perceived divisiveness and disharmony that arises from public assemblies being held in the period following a terrorist attack. We do not accept the State's submission that the purpose was only to respond to the social disharmony wrought by mass demonstrations that were perceived to be directed at particular community groups. Certainly, addressing the concern that particular groups experienced a sense of threat, fear and unease as a result of assemblies seen to be targeting them was an aspect of the legislative purpose. The requirement in s 23B(3)(b)(ii) that the Commissioner or Deputy Commissioner must be satisfied that the holding of public assemblies would be likely to cause a "risk to community safety" also reinforces the concern with the impact that public assemblies would have on others in the community. The purpose should be understood in broader terms as being to guard against the risk to social cohesion associated with public assemblies generally. That is more consistent with the scope of the power conferred by s 23B of the *TPP Act*. The power to make a PARD does not differentiate between particular types of assemblies (including assemblies targeting particular groups) and it does not enable the person making a PARD to draw such distinctions. The only type of PARD which is authorised is one that restricts all public assemblies within the declared area.

137 We also reject the State's submission that discouraging public assemblies was no more than a consequence, or a foreseen effect, of the *Amending Act* rather than an aspect of the purpose of the law. Discouraging public assemblies was the end sought to be achieved by the introduction of the PARD scheme.

The purpose of the Amending Act is not compatible with maintenance of the constitutionally prescribed system of representative and responsible government

138 The purpose of a law is legitimate in the relevant sense for the present inquiry if it is compatible with the preservation of the integrity of the system of representative and responsible government. In *Farmer* at [55] Gageler CJ, Gordon and Beech-Jones JJ observed that legislative power cannot be exercised "for the purpose of curbing disagreement and debate within Australia".

139 In *Brown*, Gageler J (as the Chief Justice then was) observed:

> [210] The defendant argues that the purpose of the impugned provisions is to "ensure that protesters do not prevent[,] impede, hinder or obstruct the carrying out of [lawful] business activities on business premises or business access areas". That composite description of purpose is problematic. To constrain the conduct of protesters as protesters is to limit freedom of political communication. To limit freedom of political communication is simply not a purpose that is compatible with the maintenance of the constitutionally prescribed system of government. *To constrain the conduct of protesters as protesters may be a means to a legitimate end, but it cannot be a legitimate end in itself.* (emphasis added)

140 Gageler CJ quoted those observations in *Ravbar* where the Chief Justice observed that "[s]uppressing political communication by the whole or some part of an employee organisation 'may be a means to a legitimate end, but it cannot be a legitimate end in itself'".

141 Those observations were consistent with his Honour's earlier observation in *Tajjour* at [148] that the end of "quelling a political controversy or of handicapping political opposition" would not be compatible with maintenance of the system of representative and responsible government established by the Constitution.

142 These various statements in the authorities leave open the possibility that it may be legitimate to seek to constrain public debate of certain kinds as a means to a legitimate end, though not as a legitimate end in itself. Relatedly, the State submitted that the purpose of preserving social cohesion is compatible with the system of representative and responsible government established by the Constitution because it is a "precondition to the full participation in civic life by all the various communities that constitute the population for whom political communication should be equally secured". The State submits that this notion of a civic environment conducive to participation by all is supported by statements in the case law concerning restrictions on political advertising. In that context it has been recognised that it is legitimate to seek to "secure the ability of all to be heard in the 'public square', rather than abdicate their responsibility to a marketplace in which the loudest voices dominate": *Unions (No 2)* at [82].

143 This attempted justification of the law involves a particular conception of civic life and "social cohesion" that is at odds with the system of representative and responsible government for which the Constitution provides. The impugned provisions are not directed to the prevention of breaches of the peace or social disorder as conventionally understood. The purpose of the PARD scheme is not confined to protecting people in the vicinity of an assembly, or even further removed, from intimidation or the threat of violence. Instead, underpinning the State's argument, and the logic of the legislature in passing the impugned provisions, is a notion that the community can and should be protected from political expression by some members of the community because it might be upsetting, inflammatory and divisive for other members of the community. This includes protecting people, including those physically well removed from a public assembly, from the sense of distress or offence that they may feel about an assembly occurring, and about the potential social repercussions of the assembly. "Social cohesion" is thus being used in a quite particular sense to signify a degree of calm and protection from dissent and disharmony associated with political activity of others. Where we refer in these reasons to the constitutionally illegitimate purpose of the impugned provisions, we are addressing this particular usage of "social cohesion". Our analysis in that regard should not be understood as signifying that, as a general proposition, maintaining social cohesion is not a legitimate legislative objective.

144 In *Monis v The Queen; Droudis v The Queen* (2013) 249 CLR 92; [2013] HCA 4 (***Monis***), Hayne J at [143] made the following observations about the need for precision in dealing with a similar concept, namely the preservation of an "ordered society":

> In general terms, it may readily be accepted that preservation of an ordered society is compatible with the constitutionally prescribed system of representative and responsible government and the freedom of political communication that is its indispensable incident. But references to an "ordered" society will mislead if they are intended to suggest that any and every end conducive to the "public interest" is compatible in the relevant sense. Like the view that any and every end within power is a "legitimate" end, this view would require the courts to balance incommensurable considerations. Even more fundamentally, the determination of what ends are "legitimate" must be made recognising that a constitutional principle is at stake. To subordinate the freedom to a law which pursues an end wholly unrelated to the freedom, even one said to be in the "public interest", would fail to recognise that the freedom is an indispensable incident of the constitutionally prescribed system of government.

145 The State gains no support from the proposition, addressed in *Unions (No 2)*, that it may be necessary in some circumstances for the legislature to take measures to ensure that all can be heard in the public square. The State's concern in enacting the *Amending Act* was not to level the playing field to ensure that no one voice is overwhelmed by another: see *Unions (No 2)* at [82]). The State rather intended to quieten all voices on the playing field for a period of time that could extend for up to 90 days. This involves a distorted notion of a public square in which dissenting and objectionable voices are suppressed, in the name of creating a more civil and tranquil environment. That is not the type of public square that the implied freedom operates to maintain.

146 The system of representative and responsible government entrenched by the Constitution, involving a free and true choice by the electors, entails acceptance of the potential for disharmony, incivility and disruption that is part and parcel of democratic intercourse. That is reflected in the longstanding recognition that the protection of dissent is at the heart of the implied freedom. It is also reflected in statements in the relevant High Court decisions about the various kinds of uncivil and objectionable behaviour that are protected by the implied freedom.

147 In *Coleman v Power* (2004) 220 CLR 1; [2004] HCA 39 (***Coleman v Power***) at [105], McHugh J held that insults are a "legitimate part of the political discussion protected by the Constitution". The relevant provision of the *Vagrants, Gaming and Other Offences Act 1931* (Qld) that was in issue in *Coleman v Power* made it a crime for a person in or near a public place to use "any threatening, abusive, or insulting words to any person". McHugh J at [102] reasoned that in order to be constitutionally valid a law of such a kind criminalising "insulting" behaviour must be drafted or construed as operating only where an intentional breach of the peace has occurred. His Honour was satisfied that regulating political statements for the purpose of preventing breaches of the peace by those provoked by the statements is an end that is constitutionally legitimate: [102].

148 Gummow and Hayne JJ construed the words "abusive" and "insulting" as meaning words which, "in the circumstances in which they are used are so hurtful as either they are intended to, or they are reasonably likely to provoke unlawful physical retaliation": [193]. As Hayne J observed in *Monis* at [199], this narrow construction of the law in *Coleman v Power* was both necessary and sufficient to support the conclusion of validity. That is because if the law were construed as criminalising conduct that merely hurt the personal feelings of another person, the law's object would be seen as being to ensure the civility of discourse. In *Coleman v Power* Gummow and Hayne JJ at [199] made clear that a law directed to ensuring civility of discourse, in its application to political content, would not be compatible with the maintenance of the constitutionally prescribed system of government. On the stricter construction, the law could be seen as having the constitutionally legitimate object of "keeping public places free from violence": [198]. Because the provision was concerned with conduct in a public place, legitimate considerations of public order arose: see *Monis* at [339].

149 Kirby J in *Coleman v Power* resolved the issue by adopting a similar approach. In concluding that "insulting" could not be given a broad meaning in the relevant offence provision, his Honour said the following, at [239] (references omitted):

> One might wish for more rationality, less superficiality, diminished invective and increased logic and persuasion in political discourse. But those of that view must find another homeland. From its earliest history, Australian politics has regularly included insult and emotion, calumny and invective, in its armoury of persuasion. They are part and parcel of the struggle of ideas. Anyone in doubt should listen for an hour or two to the broadcasts that bring debates of the Federal Parliament to the living rooms of the nation. This is the way present and potential elected representatives have long campaigned in Australia for the votes of constituents and the support of their policies. It is unlikely to change. By protecting from legislative burdens governmental and political communications in Australia, the Constitution addresses the nation's representative government as it is practised. It does not protect only the whispered civilities of intellectual discourse.

150 Similar conclusions can be drawn from the judgments in *Monis.* That case concerned s 471.12 of the *Criminal Code,* which prohibited the use of postal or similar services for communications which reasonable persons would regard as being "offensive". French CJ held that the provision infringed the implied freedom of political communication. In considering how the hypothetical "reasonable person" would approach the characterisation of any particular use of the postal or similar services, French CJ at [66]-[67] made the following observations about the character of political discourse in Australia:

> It may be accepted that the "reasonable person" whose perspective is to be adopted in determining liability under s 471.12 would be aware of the nature of political debate inside and outside parliamentary circles in Australia. The reasonable person would also be endowed with the awareness that participants in political debate in Australia include people who are reasonable, people who are unreasonable and people who are reasonable about some things some of the time and unreasonable about other things at other times. The awareness of the reasonable person invoked under s 471.12 would also be expected to extend to the existence of participants who are civil and courteous in the expression of their views and others who are strident, insulting and offensive as well as those people who may express themselves in varying registers of civility and offensiveness according to the circumstances. These are social facts which would not escape the hypothetical reasonable person.
>
> Based on a broad imputed awareness of the nature of Australian political debate and communications, reasonable persons would accept that unreasonable, strident, hurtful and highly offensive communications fall within the range of what occurs in what is sometimes euphemistically termed "robust" debate. That does not logically preclude the conclusion that a communication within that range is also one which is likely or calculated to induce significant anger, outrage, resentment, hatred or disgust. There may be deeply and widely held community attitudes on important questions which have a government or political dimension and which may lead reasonable members of the community to react intensely to a strident challenge to such attitudes. An example might be the circulation to households and offices of a pamphlet expressing opposition to Australia's involvement in a military conflict which has widespread community support, denouncing the involvement as immoral and asserting that Australian servicemen or women who suffer injury or die in the conflict do so in an immoral and futile cause. If such a pamphlet were circulated at or about the time of the funeral of a deceased serviceman or woman its timing might be a circumstance which would intensify the anger of reasonable persons about it. Examples can be multiplied in respect of different issues of government or political concern. It cannot be said that the constraints imposed on freedom of expression by s 471.12 in its application to "offensive" communications are confined to what were described in the submissions made on behalf of the Commonwealth Attorney-General as "the outer fringes of political discussion."

151 The breadth of the operation of the provision in capturing all such communications, where they are "offensive", rendered the provision incompatible with the implied freedom according to French CJ: [73]. Hayne J reached the same conclusion. In doing so, his Honour said the following about the nature of political communication protected by the implied freedom:

> History, not only recent history, teaches that abuse and invective are an inevitable part of political discourse. Abuse and invective are designed to drive a point home by inflicting the pain of humiliation and insult. And the greater the humiliation, the greater the insult, the more effective the attack may be. The giving of really serious offence is neither incidental nor accidental. The communication is designed and intended to cause the greatest possible offence to its target no matter whether that target is a person, a group, a government or an opposition, or a particular political policy or proposal and those who propound it. And any reasonable person would conclude that not only is that the purpose of what was said, its purpose has been achieved.

152 In emphasising the centrality and importance of the freedom of political communication, Hayne J described it as including "political communications that are intended to and do cause very great offence". His Honour identified the purpose of s 471.12 of the *Criminal Code* as being to protect the recipients of mail and others from offence. That is not, according to Hayne J, a legitimate object or end, because it is not compatible with the maintenance of the constitutionally prescribed system of government. His Honour proceeded to describe the object of the law as going no further than "maintaining the civility of discourse" (as opposed to keeping the peace). His Honour held, at [199], that ensuring civility of discourse in public is not a constitutionally legitimate object, and ensuring civility of private discourse is even further removed from a legitimate object. Hayne J referred at [214] to *Coleman v Power* as establishing that promoting civility of discourse is not a legitimate object or end.

153 In dealing with an argument in *Monis* that seriously offensive conduct could be legitimately prohibited, Hayne J referred to McHugh J's statement in *Coleman v Power* at [81] that insults are part of political communication. Hayne J elaborated on that proposition, at [208]-[209]:

> Insult, irony and criticism may all give offence. Sometimes, insult, irony or criticism may give such serious offence that a reasonable person would be moved to "significant anger, significant resentment, outrage", even "disgust, or hatred".
>
> Some forms of political communication are deliberately designed to offend. They may be designed and intended to offend because their content is shocking and the maker, having made reasonable inquiries to verify their content, wishes to disseminate the information widely.

154 Hayne J said the following at [220]:

> … The elimination of communications giving offence, even serious offence, without more is not a legitimate object or end. Political debate and discourse is not, and cannot be, free from passion. It is not, and cannot be, free from appeals to the emotions as well as to reason. It is not, and cannot be, free from insult and invective. Giving and taking offence are inevitable consequences of political debate and discourse. Neither the giving nor the consequent taking of offence can be eliminated without radically altering the way in which political debate and discourse is and must be continued if "the people" referred to in ss 7 and 24 of the Constitution are to play their proper part in the constitutionally prescribed system of government.

155 Crennan, Kiefel and Bell JJ likewise held that a law with the purpose of ensuring the civility of discourse in public could not meet the *Lange* test: [292]. In concluding that the law did not infringe the implied freedom their Honours were satisfied that the purpose of the law was not the preservation of civil discourse, but rather the prevention of the misuse of postal services to effect an intrusion of seriously offensive material into a person's home or workplace: [348]. Their Honours considered that a purpose of preventing citizens from such intrusion is not incompatible with the maintenance of the constitutionally prescribed system of government: [349].

156 Recognising that the constitutionally protected system of representative and responsible government entails tolerance of a certain level of incivility and disharmony does not mean that there is no room for legitimate regulation in order to maintain standards of public order. As explained at [72] above, the pre-existing legal regime in New South Wales which provides the constitutional "baseline" against which the impugned provisions are being measured includes various offence provisions directed to such matters as violent disorder, incitement of violence and hatred and advocating force or violence against a targeted group.

157 The State sought to emphasise that even if the purpose of the impugned provisions is understood as being to discourage public assemblies in the interests of protecting the community and preserving social cohesion, that should be seen as confined to the particular context of the period following a terrorist act. That qualification is accurate, given that a PARD may only be made where an authorisation has been given under s 6 of the *TPP Act* or a declaration made under Pt 2AAA of the *TPP Act.* In each case the context must be the occurrence of an incident that is, is likely to be or is believed to be a terrorist act. However, it does not avoid the constitutional problem with the impugned provisions. A terrorist act may prompt particularly acute feelings of anxiety and tension within the community. But that does not make it any more constitutionally permissible to seek to address the social repercussions of the event by quelling all public assemblies in a particular area in the name of preserving social cohesion. That remains a constitutionally illegitimate purpose even if there may be a perceived need for special measures.

158 The State's fallback position is that the impugned provisions may be seen as having more than one purpose. Mr Lim submitted that even if one purpose of the law (namely discouraging protest) is seen as being incompatible with the constitutionally prescribed system of government, another purpose of the law (being to preserve social cohesion) is compatible with that system. From this premise, Mr Lim sought to draw on statements in the authorities to the effect that a law may be justified by a legitimate purpose notwithstanding the existence of an illegitimate purpose (while acknowledging that the issue remains unsettled): *Ravbar* at [392]-[394] (Jagot J), cf Gordon J at [140] (with whom Edelman and Steward JJ agreed). We do not accept the premise of the argument. It involves an artificial distinction between the discouragement of public assemblies and the protection of social cohesion. It is not appropriate to isolate the discouragement of public assemblies as an object of the law without identifying what purpose that was intended to serve. The purpose of the law was to discourage public assemblies in order to protect social cohesion. This is not a situation where the law has a constitutionally legitimate purpose that is separate from its illegitimate purpose. It is therefore unnecessary to consider the unresolved question of principle referred to in the State's submissions.

159 For these reasons, we conclude the impugned provisions were enacted for a purpose that is not compatible with maintenance of the system of responsible and representative government for which the Constitution provides. That conclusion is true for all the impugned provisions, given that they were enacted as part of a coordinated scheme and to serve the same ends. As such, the second of the questions identified at [98] above should be answered in the negative.

160 As we have explained above, we reject the State's submission that the purpose of the impugned provisions was to restrict mass demonstrations that had a particular tendency to cause another part of the community to feel threatened or uneasy. The impugned provisions have a broader purpose directed to the link between community safety and the holding of any public assembly. Even on the narrower characterisation of legislative purpose, however, the impugned provisions do not pursue a constitutionally legitimate end.

161 In circumstances where the impugned provisions have been shown to have been enacted for a constitutionally impermissible purpose, the State cannot avoid the conclusion of invalidity by pointing out that the practical effect of any particular PARD will depend upon how the Commissioner or Deputy Commissioner chooses to exercise the power conferred by s 23B. The constitutional vice lies in the purpose for which the power has been conferred. Any exercise of power by the executive will necessarily be in pursuit of the illegitimate purpose. In those circumstances, no question of reading down the power arises and it cannot be said that any challenge to validity ought properly be directed to particular exercises of the statutory power, rather than the power itself. This is not a situation where the enabling power, on its proper construction, complies with the constitutional limitation, without any need to read it down to save its validity, such that attention should be directed instead to any particular exercise of the power in question: see *Wotton* at [22]. Nor is this a situation where the problem of a potentially unconstitutional operation could be addressed by disapplying the impugned provisions in relation to applications that would be invalid because they impose an unjustified burden: see *Palmer* at [201]-[202] (Gordon J), [219]-[220] (Edelman J), *Ravbar* at [226]-[228] (Edelman J), *Farm Transparency* at [268] (Edelman and Stewart JJ), [122], [123], [191] (Gordon J), but compare Gageler CJ at [102], citing *Pidoto v The State of Victoria* (1943) 68 CLR 87 at 111; [1944] ALR 1 at 8; [1943] HCA 37.

Are the impugned provisions reasonably appropriate and adapted to advance the legitimate object in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

162 In light of the conclusion that we have reached at the second stage of the constitutional inquiry, it is unnecessary to consider in detail the third stage. Indeed it is somewhat artificial to seek to do so, in circumstances where the Court does not accept that the impugned provisions pursue a legitimate object that is compatible with maintenance of the constitutionally entrenched system of representative and responsible government. If it is constitutionally legitimate for the State to seek to preserve social cohesion by restricting public assemblies generally for a period of time within an area fixed by executive action, then it might be seen as relatively straightforward for the State to justify the present laws (noting that the onus is on the State to do so, given the identified burden on the freedom of political communication: *Unions NSW v State of New South Wales* (2023) 277 CLR 627; [2023] HCA 4 (***Unions (No 3)***) at [30]-[33]). For example, at the necessity stage of the structured proportionality analysis it is appropriate to ask if any alternative legislature measure exists which is "as capable of fulfilling the purpose quantitatively, qualitatively and probability wise" *Tajjour* at [114]. Given that the impugned provisions seek to preserve social cohesion in a novel way by restricting public assemblies on the grounds that they are apt to cause tension and division in the community, it is unsurprising that there are no alternative legislative measures, including existing measures, that are capable of serving that purpose to the same extent.

163 There could theoretically be an intermediate position, if we are wrong in our characterisation of the purpose of the law, and the State is correct in its contention that the law is directed to restricting mass assemblies of the kind that are apt to make another targeted group in the community feel directly threatened. On that hypothesis, however, it is plain that the impugned provisions are not reasonably appropriate and adapted to achieving that end. The power to make a PARD is not confined to public assemblies of a particular kind or directed towards a particular purpose, and does not allow for the officer making the PARD to differentiate between types of assemblies.

164 Let it be assumed that the Commissioner or Deputy Commissioner perceives in the wake of a terrorist attack that in the coming 14 days there is likely to be a mass demonstration by a group associated with one particular political cause and that such an assembly is likely to be perceived as targeting a group in the community associated with a rival political cause, such that the latter community will be exposed not just to feelings of division and insecurity, but also to a heightened risk of threatening behaviour.

165 The only option available under s 23B of the *TPP Act* in those circumstances would be to select a particular area within which *all* public assemblies would be restricted. Given the absence of any necessary geographical link between the feared public assembly and the location of those in the community who might feel threatened by such an assembly, there is no obvious reason to expect that the declared area would be confined. That particular defect may be put to one side. The more immediate problem is the broad and un-discriminating nature of the restriction that is imposed, whatever its geographical scope. For the duration of a PARD made in those circumstances, the restriction would apply not just to mass assemblies by the group in question but to any other public assembly, even one concerned with completely unrelated subject matter. The restriction would apply equally to an environmental group seeking to protest against planning laws by gathering outside a council office or a collection of individuals seeking to protest against deaths in custody outside a police station. It would apply to a protest outside Parliament House against laws restricting public assemblies. That is so notwithstanding the lack of any rational connection between the holding of assemblies of that kind and a concern about a particular group in the community being targeted in other, unrelated public assemblies. Perhaps most paradoxically of all, it would apply to a proposed public assembly in support of social cohesion.

166 Given that a PARD applies to all public assemblies within the coming 14 days, the Commissioner or Deputy Commissioner can have no way of knowing what public assemblies will be affected, or what degree of risk to other members of the community (if any) might be entailed by any given assembly. There is no option under the impugned provisions other than to simply sweep up all public assemblies and subject them to the same restriction. The State failed to demonstrate why, particularly in light of the various existing laws that already regulate protest activity, it is necessary to cast such a wide net if the goal is in fact to regulate a sub-species of public assemblies, being those that pose a particular kind of threat to others in the community.

167 The lack of proportionality between the notionally legitimate objective and the means chosen to pursue that objective is a problem that is inherent in the power itself. One does not need to consider any particular exercise of the power in order to recognise the disproportionality. It follows that we do not accept the State's submission that the validity of the impugned provisions cannot be determined in the abstract without considering how the discretion to make a PARD is exercised in particular circumstances. The plaintiffs are correct in submitting that there is no application of the power that can be shown to be constitutionally permissible. Certainly the State has fallen well short of demonstrating that the power conferred by s 23B of the *TPP Act* is "justified across the range of potential outcomes of the exercise of that discretion": *Palmer* at [123]; see also [65] (Kiefel CJ and Keane J). As we have observed above in the context of considering the impermissible purpose, this is not a situation where the problem of potential invalidity can be solved by selective inapplicability of the power.

168 For these reasons, even if the impugned provisions are to be understood as having the narrower purpose urged by the State, the impugned provisions would also fail at the third stage of the constitutional inquiry. That conclusion can be reached without any need to apply a structured proportionality approach. For completeness, however, we would conclude that the State has failed to demonstrate that the impugned provisions are necessary in the sense that there is no obvious and compelling alternative, or reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom. If the purpose is to restrict assemblies only of a particular kind because of the identifiable threats to others in the community associated with those assemblies, the obvious and compelling alternative is a law which is directed to particular assemblies based on their identifiable characteristics, not all assemblies regardless of their particular characteristics.

169 The State relied in its submissions on various indications in the evidence, including security assessments made by the Australian Security Intelligence Organisation (**ASIO**), that there are heightened security concerns associated with terrorist activities and also with protest activities. The State referred in particular to regular protests in Sydney since the 7 October 2023 Hamas attack on Israel, suggesting that these and other mass protests have been linked to a degrading security environment. The material does indicate that protest activity may from time to time involve antisocial, violent and threatening behaviour. It can also amount to incitement to violence, including on the grounds of race and ethnicity. As the plaintiffs correctly submit, however, such behaviour is likely to involve an offence under one or more of the "baseline" provisions that already applied to protest activity before the *Amending Act* and which will continue to apply. The fact that public assemblies may be conducted in a way that includes criminal behaviour by some participants justifies the existence of laws that regulate the manner in which public assemblies occur. It does not justify a new regime which restricts in advance the holding of any public assembly within a declared area, without any regard for (or any capacity for the relevant executive decision-maker to assess) the type of public assembly or the conduct of participants in the assembly. ASIO's concerns have been directed to the adverse security implications, including associated social tension and a degrading threat environment, associated with particular types of public assemblies, not with all public assemblies.

170 To the extent that the material corroborates a concern about the link between particular types of mass demonstrations and resulting fear in other parts of the community, that does not avoid the three constitutional defects we have already addressed. The first is that the impugned provisions have a broader object than simply targeting assemblies having that particular propensity. The second is that quelling one particular form of political communication in the interests of protecting another part of the community from a sense of unease or threat (not associated with any proximate physical threat) is not a constitutionally legitimate purpose. The third is that even if this were a constitutionally legitimate purpose, the impugned provisions apply disproportionately to all public assemblies, without any mechanism for tailoring the restriction to mass assemblies that are said to have the particular consequence of causing another part of the community to feel threatened in such a way.

Does the Court have jurisdiction to determine the validity of the impugned provisions? If so, should it be exercised?

171 The State submitted that the Court lacks jurisdiction to determine the challenge to the impugned provisions. In the alternative, the State submitted that if the Court does have jurisdiction it should decline to exercise it. These two arguments involve a number of overlapping elements, reflecting the intersection in federal jurisdiction of considerations going to the existence of a Chapter III "matter", standing, justiciability and prudential considerations relating to the determination of constitutional questions. Where the relevant question is whether federal jurisdiction has been invoked with respect to a "matter", questions of standing are subsumed within that issue: *Croome v The State of Tasmania* (1996) 191 CLR 119 at 132-3; [1997] HCA 5 (***Croome***); *Unions (No 3)* at [15]; *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1; [2009] HCA 23 (***Pape***) at [50]-[51], [152], [273].

172 The critical point from the State's perspective is that the PARD is no longer in force and cannot now be revived. The impugned provisions are therefore dormant, and the validity of those provisions has no immediate legal significance for the plaintiffs. That will remain the case until a further PARD is made, which the State says is no more than a speculative possibility. The State's argument proceeds on the basis that there was a Chapter III matter in respect of which the plaintiffs did have standing when proceedings were commenced, but this ceased to be the case on 17 February 2026 when the PARD lapsed.

173 The High Court made clear in *Unions (No 3)* that it is not sufficient that a matter existed at the commencement of proceedings. Where circumstances change there may cease to be a matter amenable to determination in the exercise of federal jurisdiction: at [13]-[22]. An aspect of this analysis is that a plaintiff may have standing to commence proceedings, but may lack standing by the time the proceedings fall to be determined by a court. The State argues that the present case is an example of this phenomenon. While acknowledging that the plaintiffs had standing and a Chapter III matter existed at the commencement of proceedings, the State argues that the plaintiffs have not had standing since the PARD lapsed and likewise there is no longer a "matter".

174 The State emphasises that this is a question of jurisdiction. If there is no longer a justiciable Chapter III matter, as the State contends, the Court lacks jurisdiction to make declarations of invalidity.

175 One point of distinction between *Unions (No 3)* and the present case warrants immediate emphasis. In *Unions (No 3)* the plaintiff sought to challenge the validity of certain provisions which had been repealed prior to the hearing in the High Court. The case therefore transitioned from a challenge to the law that was in force to a case about the validity of past laws. It was in that context that the Court held that there was no longer a matter amenable to the exercise of federal judicial power. The plaintiffs in that matter argued, unsuccessfully, that there remained a live dispute about the past invalidity of the repealed provisions: see 629. That past state of affairs did not generate a "matter". Nor did the possibility of laws of a similar kind being enacted in the future. The High Court held that a court exercising federal judicial power cannot be asked to rule on the validity of possible future legislation that might be materially similar to past legislation: *Unions (No 3)* at [27].

176 The situation in the case before us is different. The impugned provisions are still in force. The plaintiffs challenge to the impugned provisions remains, as it has been since commencement of the proceedings, a challenge to the governing law in the form of the impugned provisions. The existence of the PARD was a matter relied on by the plaintiffs for the purpose of establishing their standing and, to the extent necessary, the existence of a concrete dispute requiring swift resolution. But the expiry of the PARD has not altered the substance of the plaintiffs' claim for relief. The power to make a PARD persists. At any time, if an authorisation is given under s 6 of the *TPP Act* or a declaration is made under Pt 2AAA, the Commissioner or a Deputy Commissioner would be empowered to make and extend a PARD if satisfied of the necessary matters under s 23B of the *TPP Act*. That in turn would trigger the operation of the impugned provisions of the *Summary Offences Act* and *LEPRA*.

177 In order for a "matter" in the constitutional sense to exist, there must be some immediate right, duty or liability to be established by the determination of the court: *Re Judiciary Act 1903-1920; Re Navigation Act 1912-1920* (1921) 29 CLR 257 at 265; [1921] HCA 20 (***Re Judiciary and Navigation Acts***). In *Hobart International Airport Pty Ltd v Clarence City Council* (2022) 276 CLR 519; [2022] HCA 5 (***Hobart International Airport***) at [47] Gageler and Gordon JJ said (references omitted):

> The central conception of a matter is of a justiciable controversy between defined persons or classes of persons about an existing legal right or legal obligation. The controversy is justiciable if it is capable of being resolved in the exercise of judicial power by an order of a court which, if made, would operate to put an end to the question in controversy through the creation of "a new charter by reference to which that question is in future to be decided as between those persons or classes of persons" [*R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 374]. Conversely, a controversy between defined persons or classes of persons about an existing legal right or legal obligation which is not capable of being resolved in the exercise of judicial power by an order of a court is not justiciable and is not a matter.

178 A court cannot be empowered under Chapter III to exercise federal judicial power to make a declaration of the law "divorced from any attempt to administer that law": *Re Judiciary and Navigation Acts* at 266. The judicial administration of the federal law, in the resolution of a "matter", involves the correct application of federal law in resolving a particular claim: *Fencott v Muller* (1983) 152 CLR 570 at 609; [1983] HCA 12, cited in *Croome* at 136.

179 A necessary element of a "matter" is that it is amenable to an exercise of judicial power in respect of which a court can grant relief which both quells a controversy between parties and is available at the suit of the party seeking such relief: *Unions (No 3)* at [15]. The judicial power of the Commonwealth cannot be exercised to provide advice to the executive on the validity of a law, divorced from a particular existing controversy arising in a legal proceeding where there is an existing right, duty or liability to be established by the determination of the court: *Croome* at 136. It is not the function of a court exercising federal jurisdiction to give legal answers or declare legal principles: *Unions (No 3)* at [14]. Instead a matter must be capable of resolution by legal remedy for a wrong. "A legally enforceable remedy is as essential to the existence of a matter as the right, duty or liability which gives rise to the remedy": *Abebe v The Commonwealth* (1990) 197 CLR 510 at 527; [1990] HCA 14 at [31]. A "legally enforceable remedy" is an order capable of being made by a court in the exercise of coercive judicial power which, subject to appeal, authoritatively determines the question about the right, duty or liability in controversy: *Hobart International Airport* at [48].

180 A declaration of right is such a remedy. A declaration has the requisite final and preclusive legal effect in quelling the controversy between the parties: *Hobart International Airport* at [53]. The formulation of the governing principles in *Unions (No 3)* directs attention to the limitations of the relief sought in any particular proceeding. In the case of declaratory relief, the critical constraint is that a declaration can only issue if it will produce foreseeable consequences for the parties: *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319; [2010] HCA 41 at [103].

181 In *Croome*, Tasmania contended that there was no matter in respect of which the High Court had jurisdiction because the case did not raise a question about the application of the impugned laws to the plaintiffs: at 125. The laws in question criminalised sexual intercourse between males and acts of gross indecency committed by a male with another male. Tasmania pointed to the fact that no prosecution against the plaintiffs was pending or threatened. That argument was rejected. The High Court held that a matter arose because the question being raised was whether the impugned provisions operate and have operated, since their enactment in Tasmania. The absence of any existing or threatened prosecution was found not to "touch that question": at 125. Brennan CJ, Dawson and Toohey JJ explained that where an existing law is challenged on the basis that it is inconsistent with the Commonwealth Constitution, the law being administrated is the Constitution and there is an immediate right to the proper operation of the Constitution on the law of Tasmania: at 125.

182 Brennan CJ, Dawson and Toohey JJ held, at 125-126 (footnotes omitted):

> It is a long-standing doctrine that a "matter" may consist of a controversy between a person who has a sufficient interest in the subject and who asserts that a purported law is invalid and the polity whose law it purports to be. In *Toowoomba Foundry Pty Ltd v The Commonwealth*, Latham CJ said:
>
>> "The plaintiff has relied upon the practice of the Court in allowing the constitutional validity of statutes and regulations and orders made thereunder to be challenged by interested persons in actions claiming only declarations of invalidity: See, eg, *Attorney-General for NSW v Brewery Employés Union of NSW; Colonial Sugar Refining Co Ltd v Attorney-General for the Commonwealth*. More recently, see *Victorian Chamber of Manufactures v The Commonwealth (Prices Regulations)* and *Victorian Chamber of Manufactures v The Commonwealth (Women's Employment Regulations)*. It is now, I think, too late to contend that a person who is, or in the immediate future probably will be, affected in his person or property by Commonwealth legislation alleged to be unconstitutional has not a cause of action in this Court for a declaration that the legislation is invalid."
>
> It is a misconception of the principle in *In re Judiciary and Navigation Act* to suggest that, in proceedings for a declaration of invalidity of an impugned law, no law is administered unless the executive government has acted to enforce the impugned law. The law that is being administered in such proceedings is not the impugned law but the constitutional or administrative law which determines the validity or invalidity of the impugned law. Thus Gavan Duffy, Rich and Starke JJ in *James v South Australia* identified a "right, title, privilege or immunity" claimed under the Constitution as the criterion of a matter arising under the Constitution or involving its interpretation. A declaration of validity or invalidity of an impugned law administers the law governing the controversy about the impugned law. If it were otherwise, there would be no jurisdiction in this Court to determine an action by the Attorney-General of a State for a declaration that a challenged Commonwealth law is invalid. Yet an action of that kind is the classical vehicle for exercising this Court's constitutional jurisdiction.

183 The distinction between the present case and the situation that arose in *Unions (No 3)* is important at least because of the operation of this principle. The analysis in *Croome* demonstrates that in the present case, unlike in *Unions (No 3)*, there is an immediate right to be determined by the Court. That is because the plaintiffs allege that the impugned provisions are invalid on the basis that they are contrary to the Constitution. The continued existence of the law empowering the Commissioner or a Deputy Commissioner to make a PARD, with all of the consequences then triggered under the impugned provisions, puts the plaintiffs in a position of jeopardy about the operation of the impugned provisions upon them. Unlike in *Unions (No 3),* that does not involve a complaint about the validity of a past law. Nor does it involve a concern about the prospect that the legislature might act in the future to resuscitate a legislative burden on the plaintiffs. It is a complaint about the validity of existing laws, in respect of which the plaintiffs assert they have a special interest because of the way in which those laws are likely to impact on them, if and when a fresh PARD is made.

184 As the plurality judgment in *Unions (No 3)* emphasised at [27], there is an important distinction between challenges concerned with administrative decisions or delegated legislation and challenges concerned with a repealed law. In the former case, for so long as the power to make an executive decision or delegation legislation of the relevant kind persists, there is an existing law that may be the subject of a declaration of right. In the latter case, that is not so.

185 The High Court has recognised the continued existence of a "matter" in circumstances of this kind, including because foreseeable consequences will follow from relief directed to quelling a controversy about the validity of powers which may be exercised in the future. In *Unions (No 3)* it was accepted, at [27], that a plaintiff may in some cases be able to show that there will be foreseeable consequences from the grant of a declaration where the plaintiff can establish that, even though the particular asserted wrong has ceased, there is a risk of repetition. The plurality judgment in *Unions (No 3)* cited in that regard *Wragg v State of New South Wales* (1953) 88 CLR 353; [1953] HCA 34 (***Wragg***) and *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42; [2016] HCA 1 (***Plaintiff M68***).

186 In *Wragg* the plaintiffs sought a declaration as to the validity of the power conferred on the Prices Commissioner by the *Prices Regulation Act 1948-1949* (NSW) to fix by order the maximum price for the sale of potatoes in New South Wales, in circumstances where potatoes had been declared to be goods subject to the price fixing regime. The plaintiffs were potato growers who sold potatoes in New South Wales. Price fixing orders affecting them had been made, but they were revoked by the time of hearing of the case stated in the High Court. The underlying declaration that potatoes were declared goods within the meaning of the *Prices Regulation Act* had also been revoked.

187 The State submitted that because there was neither a declaration nor a price fixing order in operation the plaintiffs no longer had standing to obtain a declaration as to the validity of the governing provisions: at 369. The plaintiffs argued that they still had standing in respect of a justiciable controversy, in circumstances where there remained a threat to re-enact the price-fixing orders and to again make a declaration that would bring potatoes under the control of the price fixing regime: at 369. The plaintiffs, as traders of potatoes, were said to have an interest in maintaining the suit for declarations as to the extent to which the Prices Commissioner may make price-fixing orders affecting their trade: at 370. The High Court was satisfied that the plaintiffs had standing. The attitude of the Court was described by Dixon CJ at 371 (emphasis added):

> We think you may proceed. We do not propose to say anything to tie our hands in the matter but probably all of us are impressed with the view that *really what is in issue is whether what has been done can be repeated*.

188 In *Plaintiff M68* the relevant question was whether the plaintiff had standing to seek a declaration of the unlawfulness of her detention in a regional processing centre on Nauru. That detention stemmed from the combined effect of the conditions of the plaintiff's visa, said to arise from arrangements between the Commonwealth and Nauru, and Nauruan law. Following the commencement of proceedings and prior to hearing, the government of Nauru announced, by gazetted notice, that those who had been held in regional processing centres would instead be allowed freedom of movement on Nauru pursuant to an "open centre" arrangement. This raised an issue as to whether the plaintiff had lost standing to maintain the challenge to the lawfulness of her detention, and hence whether there was no longer a Chapter III matter. The Commonwealth submitted that the proceedings had come to be about the validity of past conduct at the time the plaintiff had been detained and any declaration sought by the plaintiff would have no foreseeable consequences for her: at [23].

189 The High Court was satisfied that standing had not been lost, and a justiciable controversy about the validity of detention remained. French CJ, Kiefel and Nettle J held at [23] that it was sufficient that the declaration sought by the plaintiff would resolve the question as to the lawfulness of the Commonwealth's conduct with respect to the plaintiff's detention and whether such conduct was authorised by Commonwealth law. As that question was grounded in factual reality, it was not a hypothetical question. As to the foreseeable consequences of declaratory relief, their Honours were satisfied that the proceedings would "resolve the question whether the Commonwealth is at liberty to repeat that conduct if things change on Nauru and it is proposed, once again, to detain the plaintiff at the Centre": at [23].

190 Bell J was likewise satisfied that the proceedings involved the determination of a legal controversy in respect of which the plaintiff had a real interest. Her Honour was satisfied that the declaration had foreseeable consequences "given that Nauru may choose to revert to a scheme under which asylum seekers taken to it by the Commonwealth are detained": at [64].

191 Keane J reached the same conclusion for similar reasons. His Honour said the following, at [235], quoting *Wragg* at 371:

> [E]ven though it may be unlikely, as a practical matter, that the arrangements under which the detention was effected will be applied in the future, it is difficult not to be "impressed with the view that really what is in issue is whether what has been done can be repeated".

192 Our analysis to this point has drawn out a number of the essential characteristics of a Chapter III matter. Putting to one side the element of standing (which will be dealt with in more detail below), each can be seen to be present in the controversy before this Court. The plaintiffs are seeking a determination in respect of an existing legal right, namely the validity of the impugned provisions. That involves the administration of the law, by way of enforcement of the limits on legislative power derived from the Commonwealth Constitution. It concerns a controversy between defined persons, namely the plaintiffs and the State. The legal question is grounded in real facts and cannot be described as hypothetical. The controversy is capable of being resolved judicially by relief in the form of declaratory orders that would quell the controversy and create a new charter by reference to which the question of validity is to be decided. Resolution of the controversy would produce foreseeable consequences for the parties. If the plaintiffs are successful, the risk of a repeat of the exercise of the PARD making power will be removed. The plaintiffs will no longer face the threat of their future protest activities being restricted by an exercise of power to impose a PARD.

193 That conclusion is consistent with the conclusions reached by the High Court in *Croome, Wragg* and *Plaintiff M68*. In *Croome* a Chapter III matter was found to exist by reason of the existence of the impugned provisions and their potential impact on the plaintiffs, notwithstanding that there was no demonstrated risk of prosecution for particular conduct. The risk of future adverse operation of the challenged law upon the plaintiffs was sufficient. That was in keeping with the approach taken in *Wragg* and *Plaintiff M68.*

194 The State submitted that there is a critical distinction in the present case, in that the impugned provisions can have no adverse operation on the plaintiffs unless and until an authorisation is given under s 6 of the *TPP Act* or a declaration made under Pt 2AAA of the *TPP Act and* the Commissioner or a Deputy Commissioner decides to make a PARD based on satisfaction about the relevant criteria in s 23B. However, the decisions in *Wragg* and *Plaintiff M68* demonstrate that this is not a relevant point of distinction. In each of those cases, at the time of hearing the impugned laws and arrangements were not engaged as against the plaintiffs. That situation would only change in the future if and when administrative discretions and powers were exercised in a particular way to recreate the particular burden on the plaintiffs that had arisen in the past. Nevertheless, the potential for the existing law to be administered in this way was sufficient to give rise to a justiciable controversy, the resolution of which would produce foreseeable consequences for the parties. Contrary to the State's submission, no principled basis for drawing a distinction with *Wragg* arises from the fact that the power to make a PARD under s 23B of the *TPP Act* can only be exercised if the decision-maker is satisfied about the existence of a particular state of affairs.

195 The State also submitted that *Wragg* should not be relied on in the present context because *Wragg* concerned a claim under s 92 of the Constitution and at the time *Wragg* was decided s 92 was understood to confer personal rights. However, nothing in the reasoning in *Plaintiff M68* or *Unions (No 3)* suggests that the authority of *Wragg* can or should be confined in this way.

The risk of a fresh PARD being made in the future

196 Our conclusion in the preceding paragraph is also consistent with the statement of Latham CJ in *Toowoomba Foundry Pty Ltd v The Commonwealth* (1945) 71 CLR 545 at 570; [1945] HCA 15 (quoted in *Croome* at 125-6) that it is "too late to contend that a person who is, or in the immediate future probably will be, affected in his person or property by Commonwealth legislation alleged to be unconstitutional has not a cause of action [in the High Court] for a declaration that the legislation is invalid". Although Latham CJ referred in that passage to the "probability" that a plaintiff will be affected in the "immediate future", the High Court has not maintained any requirement that a plaintiff must demonstrate such a degree of "probability" of future application of impugned legislation. Nor has the High Court limited the principle to situations where it has been shown that any repeat of a previous arrangement is likely to occur in the "immediate" future. In both *Wragg* and *Plaintiff M68* it was sufficient that there was a risk that the laws and arrangements under challenge might in the future come to be applied again to the plaintiffs in the prejudicial way that they had in the past been applied.

197 The State did submit that the risk in question must be more than "hypothetical, remote or theoretical". None of those expressions finds particular support in *Wragg*, *Plaintiff M68* or *Unions (No 3)*. It may be accepted that a risk that is purely hypothetical or theoretical is not a material risk for these purposes. A "remote" risk could potentially be a material risk, depending on the circumstances. We do not agree that as a general proposition a "remote" risk of the repetition of executive action is necessarily inadequate. In any event, nothing turns on that issue for present purposes. We would not describe the risk of a PARD being made in the future as remote, for the reasons which follow.

198 We consider it sufficient to find that there is a material risk that within the foreseeable future a PARD may again be made which impacts adversely on one or more of the plaintiffs in their intended protest activities. It follows that nothing turns, in our view, on the debate that developed between the parties about the degree of likelihood of that occurring. It is sufficient to observe that there is a material risk that circumstances will arise in the foreseeable future that will prompt an authorisation to be given under s 6 of the *TPP Act* and/or a declaration made under Pt 2AAA of the *TPP Act* and that if that occurs the Commissioner or a Deputy Commissioner will make a PARD that restricts the plaintiffs in their protest activities.

199 If we are wrong in our approach, and it is necessary to identify not just a material risk but also a particular degree of likelihood, we would conclude that the State has underestimated the prospect of this occurring. In particular, it is more than a remote risk. The State submitted that it is rare for circumstances to arise that would make it possible for a PARD to be made. The State argues in this regard that an authorisation under s 6 of the *TPP Act* or declaration under Pt 2AAA of the *TPP Act* can only be made in response to a terrorist act or an act suspected of being a terrorist act. The State points to the fact that only one such authorisation has been issued and no declaration has ever been made under Pt 2AAA.

200 The plaintiffs, while accepting that it is legally correct that a PARD can only be made following such an authorisation or declaration, say that there is a relatively high likelihood that an act of the relevant kind will occur in the foreseeable future, enlivening the possibility of an authorisation under s 6 or a declaration under Pt 2AAA, and also the possibility that circumstances would lead the Commissioner or a Deputy Commissioner to form the requisite state of satisfaction and make a PARD under s 23B. As the plaintiffs correctly submit, "terrorist act" is defined in the *TPP Act* in such a way as to capture acts occurring anywhere in the world. The correct starting point is therefore the prospect of an act of that kind occurring somewhere in the world. Unfortunately, as the plaintiffs submit, terrorist acts are a relatively routine occurrence around the world. Even within Australia, the risk of a future terrorist incident is relatively high, as reflected in the lifting of the National Terrorism Threat Level from "Possible" to "Probable" in August 2024.

201 The plaintiffs are correct to draw attention to the relative breadth of the definition of "terrorist act". Nevertheless, there is still likely to be a need for some connection with Australia or Australian authorities in order for an authorisation to be given under s 6 of the *TPP Act* or a declaration made under Pt 2AAA. A declaration under s 6 can only be made if the relevant officer giving the authorisation is satisfied that the exercise of the special powers conferred by Pt 2 will "substantially assist in apprehending the persons responsible for committing the terrorist act". It does not follow that the act itself must occur in Australia or that the suspects thought to be responsible for committing the act must be located in Australia. However, it is unlikely to be a routine occurrence that the exercise of special powers in New South Wales will be thought to provide special assistance in apprehending persons responsible for a foreign terrorist act. Pt 2AAA is more closely linked to New South Wales itself. A declaration under s 24A may only be made in respect of an incident to which NSW officers are responding and planned or coordinated action by NSW officers is required to defend any persons threatened by the terrorist act or to prevent or terminate their unlawful deprivation of liberty.

202 These are limiting factors that do substantially reduce the probability of future PARDs. Nevertheless, we are satisfied that the possibility of an authorisation being given under s 6 of the *TPP Act* or a declaration being made under Pt 2AAA is not remote. As to the prospect of a PARD being made if an authorisation or declaration is in place, we consider there to be a relatively high prospect of that occurring. The logic of the PARD scheme, and the breadth of the concept of "community safety" in s 23B, means that if the conditions are such as to prompt an authorisation or declaration, the Commissioner or a Deputy Commissioner may well be satisfied that it is also appropriate to make a PARD.

203 It is unrealistic to seek to anticipate the precise form of PARD that might be made in such circumstances. However, the same features of s 23B point to the conclusion that if a PARD is made, it is likely to be one that adversely affects one or more of the plaintiffs in their protest activities. The preferred locations for protest activity are apt to be the very locations covered by a PARD, once the objects of the *Amending Act* are appreciated. The breadth of the PARD made on 24 December 2024 tends to confirm these inferences.

The standing of the plaintiffs as a necessary element of a Chapter III matter

204 The intersection between standing and the existence of a matter was addressed by Gageler and Gleeson JJ in *Hobart International Airport* at [49]. Their Honours, having explained that a matter involves a justiciable controversy between defined persons about an existing legal right or legal obligation, explained that justiciability of such a controversy depends on:

> (1) the power of a court to make an order that would operate to resolve the controversy between those persons; and (2) the right of one or more of those persons to seek that order from that court. Standing, in the sense of a right to seek from a court an order that would operate to resolve the controversy, is in that way inseparable from justiciability and, therefore, is intrinsic to the existence of the matter without which the federal jurisdiction of the court to make the order cannot exist. That is what has been meant when it has often been said that standing is "subsumed within the constitutional requirement of a matter" [see *Pape* at 68 [152]].

205 In *Croome*, Brennan CJ, Dawson and Toohey JJ noted that a justiciable controversy does not arise unless the person who seeks to challenge the validity of the law has a sufficient interest to do so: at 126. A person with sufficient interest to raise a justiciable controversy as to the validity of a law is regarded as having or claiming a right to a declaration. It is the right to seek such a declaration that satisfies the requirement identified in *Re Judiciary and Navigation Acts*: *Croome* at 127.

206 In *Unions (No 3)* at [16] Kiefel CJ, Gageler, Gordon, Gleeson and Jagot JJ explained that what is required to establish standing varies with the nature of the relief that is sought and according to the type of controversy. Relevantly for present purposes, their Honours said (footnotes omitted):

> Where, as here, the relief sought is declaratory of the invalidity of legislation, standing has traditionally been explained in terms of a requirement for the party seeking the relief to have a "real" or "sufficient" interest in obtaining the relief. That requirement is closely aligned with the requirement that, for the making of a declaration to constitute an exercise of judicial power, the declaration must be seen at the time of its making to produce foreseeable consequences for the parties.

207 The State concedes that by virtue of their history of protest activities and their interest in undertaking protests in the area affected by the PARD the plaintiffs were affected by the impugned provisions in a different and additional way from those who do not regularly engage in such activities. That signifies that the plaintiffs had an interest in the validity of the impugned provisions, when proceedings were commenced, which was real and set them apart from others in the community who did not have such a record of activity. That is enough to have given the plaintiffs standing when proceedings were commenced.

208 The State's concession is properly made in light of the agreed facts about the regular pattern of protest activity by each of the plaintiffs. When considering the question of standing in circumstances where the PARD has expired, it remains relevant to consider those same facts about the plaintiffs, combined with the stated intention of each plaintiff to continue protest activities in the future and the likelihood that they will seek Form 1 authorisations as appropriate (which is inherently plausible given the historical activities of each of them).

209 In light of the principles and authorities we have set out above, the combined effect of the history of protest activity by each of the plaintiffs and their future intention to maintain such activity is enough to demonstrate a real and sufficient interest of the kind required to support a claim for declaratory relief about the validity of the impugned provisions. The State's argument that the standing of the plaintiffs evaporated when the PARD expired must be rejected in light of the ongoing operation of the impugned provisions and the non-remote risk that the provisions may again come to apply to the plaintiffs in a way that adversely impacts upon their activities.

The assertion of private rights as an alternative basis for establishing standing

210 The plaintiffs submitted, as an alternative answer to the State's submission that they lack standing, that one or more of them has standing in connection with private causes of action that they may be able to assert as a consequence of protest activities said to be affected by the impugned provisions.

211 In light of our acceptance of the plaintiffs' primary argument that they have standing to seek declarations of right irrespective of any private causes of action they may have against police officers, it is not essential to resolve the alternative argument. For completeness, however, we do not accept that standing in respect of such private rights of any of the plaintiffs has been established.

212 Mr Hume SC submitted that both the first and third plaintiffs had been touched and arrested during the Herzog protest, that there is a possibility they will be charged and that there may be a basis to argue that the police officers who interacted with the first and third plaintiffs were purporting to exercise powers under *LEPRA*, including powers that were only applicable on the premise that a valid PARD was in operation. By that route, the first and third plaintiffs argue that the validity of the impugned provisions would have ramifications for their rights if they are charged with respect to their conduct during the Herzog protest.

213 Each step in the argument involves a substantial element of uncertainty, if not speculation. Neither the first nor third plaintiff has been charged and it was not demonstrated by reference to any evidence that there is a material prospect of them being charged. As we have set out above, we do not accept the basal proposition that the police officers in question were exercising relevant powers under *LEPRA*. The State submits, with the support of numerous authorities, that constitutional issues ought not be decided unless there is a state of facts which makes it necessary to decide those issues. There is no way of knowing, as things stand, whether the first plaintiff or the third plaintiff has a private cause of action against police, the resolution of which would properly require resolution of the constitutional issue. In the circumstances, the requisite connection between the conduct of the first and third plaintiffs at the Herzog protest and the validity of the PARD scheme is not established.

214 In relation to the activities of the third plaintiff at the protest in Hyde Park, it was submitted that an assault could arguably have been committed by police officers who prevented the second plaintiff and others involved in the rally to mark the anniversary of Mr Dungay's death from moving across Hyde Park. The submission was that such an assault, if it occurred, was causally connected to the PARD that was applicable to surrounding streets, such that in the absence of the PARD the police conduct would not have occurred. That analysis again involves a number of speculative steps, including an unstated assumption about the authorisation, if any, that might have applied for the assembly if the impugned provisions were not in force. As with the first and third plaintiffs, if it were necessary to decide the issue we would not be satisfied that standing in respect of a potential private claim for assault has been established.

Prudential considerations and the existence of a sufficiently concrete controversy

215 In some circumstances, it may be inappropriate to determine a constitutional question because the supposed controversy is not one that truly requires resolution or the dispute is not sufficiently concrete to be appropriately amenable to adjudication. In *Zhang v Commissioner of Australian Federal Police* (2021) 273 CLR 216; [2021] HCA 16 (***Zhang***) at [21], the High Court referred to the unanimous observation in *Lambert v Weichelt* (1954) 28 ALJ 282 at 283 (***Lambert v Weichelt***) that "[i]t is not the practice of the Court to investigate and decide constitutional questions unless there exists a state of facts which makes it necessary to decide such a question in order to do justice in the given case and to determine the rights of the parties". The judgment of the Court in *Zhang* proceeded as follows:

> The Court explained in [*Knight v State of Victoria* (2017) 261 CLR 306 at 324, [32]] that "it is ordinarily inappropriate ... to be drawn into a consideration of whether a legislative provision would have an invalid operation in circumstances which have not arisen and which may never arise if the provision, if invalid in that operation, would be severable and otherwise valid". It is similarly ordinarily inappropriate in such circumstances to be drawn into a consideration of whether a legislative provision would be invalid if construed one way if the provision would be capable of being construed another way to have some valid operation to the facts before the Court.

216 Their Honours at [22] referred with approval to the description of this approach in *Clubb* at [35]-[36] as reflecting the "usual practice" which is "based upon prudential considerations". In *Tajjour* at [174] one of the prudential considerations supporting such an approach was identified as being to avoid "the risk of premature interpretation of statutes on the basis of inadequate appreciation of their practical operation".

217 The High Court revisited these issues in *Mineralogy v State of Western Australia* (2021) 274 CLR 219; [2021] HCA 30 (***Mineralogy***). At [56]-[59], Kiefel CJ, Gageler, Keane, Gordon, Stewart and Gleeson JJ said that the "cautious and restrained approach to answering questions agreed by the parties in a special case", applying the principle described in *Lambert v Weichelt*:

> [57] … is a manifestation of a more general prudential approach to resolving questions of constitutional validity "founded on the same basal understanding of the nature of the judicial function as that which has informed the doctrine that the High Court lacks original or appellate jurisdiction to answer any question of law (including but not confined to a question of constitutional law) if that question is divorced from the administration of the law" [*Clubb* at [136]]. …
>
> [58] Underlying the prudential approach is recognition that the function performed by the Full Court in answering a question of law stated for its opinion is not advisory but adjudicative. Underlying it also is recognition that performance of an adjudicative function in an adversary setting "proceeds best when it proceeds if, and no further than is, warranted to determine a legal right or legal liability in controversy" [*Clubb* at [137]]. That is to say, "the adjudicatory process is most securely founded when it is exercised under the impact of a lively conflict between antagonistic demands, actively pressed, which make resolution of the controverted issue a practical necessity" [*Poe v Ullmann* (1961) 367 US 497 at 503].
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> [59] Two implications of the prudential approach repeatedly spelt out are that "a party will not be permitted to 'roam at large' but will be confined to advancing those grounds of challenge which bear on the validity of the provision in its application to that party" [*Knight v State of Victoria* (2017) 261 CLR 306 at [33]] and that "it is ordinarily inappropriate for the [Full] Court to be drawn into a consideration of whether a legislative provision would have an invalid operation in circumstances which have not arisen and which may never arise if the provision, if invalid in that operation, would be severable and otherwise valid" [*Knight v State of Victoria* at [33]].

218 The State submitted that prudential considerations would tell against resolution of the present matter, even if the Court has jurisdiction. The State did not contend that there was any deficiency in the factual record relevant to determining the plaintiffs' challenge that would stand in the way of the Court ruling on the validity of the impugned provisions. The parties have had an opportunity to adduce evidence relevant to that challenge. The State did not seek to argue that the evidence resulting from that process is deficient in the sense that there is not a sufficiently concrete controversy amenable to resolution by the Court.

219 However, the State did argue that the abstract nature of the challenge to the impugned provisions gives rise to prudential considerations. The plaintiffs do not seek to challenge the validity of any particular exercise of power under the impugned provisions. They instead attack the validity of the power to make a PARD, and all of the provisions of the PARD scheme that operate by reference to a PARD once made. As the State emphasised, a challenge to the validity of a provision like s 23B of the *TPP Act* that confers discretionary power on the executive presents its own difficulties. In that connection the State emphasised that this Court was being invited to determine the validity of the impugned provisions, including the power to make a PARD, in the abstract and not in the context of a particular exercise of that power that would give shape to its operation.

220 We do not accept the submission that prudential considerations of the kind described in *Zhang* and *Mineralogy* are engaged. There does exist a state of affairs which makes it necessary to decide the question of the validity of the impugned provisions in order to do justice in the given case and to determine the rights of the parties. The plaintiffs have chosen squarely to challenge the validity of the power to make a PARD, as they are entitled to do. The resolution of that challenge is necessary to determine the legal position and resolve the controversy between the parties. Doing so is plainly within the adjudicative function of the Court, and does not involve any trespass into the forbidden territory of advisory judgments. Declaring the impugned provisions to be invalid does not require any element of speculation about unknown factual circumstances and potential modes of operation. It flows instead from a proper application of constitutional limitations to the law as enacted.

221 If there had been prudential considerations telling against determination of the plaintiffs' challenge, it would be relevant to bring to bear additional considerations that might point the other way. Accepting the State's submission about the application of prudential considerations would have significant implications for the conduct of effective litigation directed to challenging the PARD scheme in the future. In essence, it would mean that a legal challenge to the impugned provisions could only be brought and maintained if the proceedings were instituted, heard and determined while a PARD is in force. That would present severe, if not insurmountable, practical obstacles to those wishing to bring such proceedings. PARDs can operate for a maximum of 90 days but may only be extended every 14 days and, in many cases, may operate for a much shorter period of time. Preparing and running an effective constitutional challenge within such a timeframe is highly impractical, especially given the iterative 14 day nature of extensions.

222 The point can be illustrated by the present case. The Court has been assisted by detailed written and oral submissions from experienced counsel, reflecting the complexity of the issues arising in the case. A reasonable opportunity had to be afforded for intervention by the Attorneys-General pursuant to the *Judiciary Act 1903* (Cth). Time was sought (including by the State) and required for the preparation of evidence, including agreed facts necessary for the proper resolution of the proceedings. It is unrealistic to expect that proceedings of this kind could, even with the utmost expedition, be instituted, prepared, heard and determined while a PARD remains in force, without substantial compromise to the quality of the work required at every stage. That in turn suggests a highly undesirable position where the constitutional limits on State legislative power could not, in this particular area of operation, be enforced, except in a suboptimal manner. It is not in the interests of justice for important constitutional issues of this kind to be heard and decided in a disorderly way. For these reasons, even if there were prudential considerations telling against determination of the present challenge we would be inclined to say that they are outweighed by other considerations that are equally connected to the proper administration of the Constitution.

Conclusion

223 The impugned provisions infringe the implied freedom of political communication. The State did not seek to argue that if the substance of the plaintiffs' argument was accepted, and the Court was satisfied that it had jurisdiction which should be exercised, the declarations sought by the plaintiffs are nevertheless inappropriate or should be confined to particular impugned provisions only. We are satisfied that it is appropriate to declare that each of the impugned provisions is invalid.

224 The orders of the Court are:

(1) The Court declares that Part 2, Division 3A of the *Terrorism (Police Powers) Act 2002* (NSW) impermissibly burdens the implied constitutional freedom of communication on government and political matters and is invalid.

(2) The Court declares that section 200(5) of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) impermissibly burdens the implied constitutional freedom of communication on government and political matters and is invalid.

(3) The Court declares that sections 27A and 27B *Summary Offences Act 1998* (NSW) impermissibly burden the implied constitutional freedom of communication on government and political matters and are invalid.

(4) The defendant is to pay the plaintiffs' costs.

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Decision last updated: 16 April 2026